

Indiana Law Review



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1958-1999

The *Indiana Law Review* dedicates this issue to Minde C. Browning for her friendship and commitment to the *Law Review*. Minde, herself a graduate of the Indiana University School of Law—Indianapolis, was a member of the law library faculty for ten years. She served as Assistant Director for Reader Services and Assistant Director of the Program for Management of Legal Information Systems.

Minde provided constant guidance for *Law Review* editors and helped new *Law Review* members to better understand reference services and database searches. She also helped maintain the *Law Review*'s website, including the placement of back issues at the site.

The *Indiana Law Review* deeply feels the loss of Minde's support, patience, talent, and energy.



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WOMEN AND THE LAW: FACING THE MILLENNIUM

In celebration of the *Indiana Law Review*'s first all-female Executive Board, this issue explores the relationship between women and the law. We extend our thanks to Professor Florence Roisman for planting the seed that germinated into this issue; and Professor David Papke for encouraging us to implement our ideas for progressing the *Law Review*.

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INTRODUCTION TO WOMEN AND THE LAW: FACING THE MILLENNIUM *INDIANA LAW REVIEW*

RUTH BADER GINSBURG*

I am pleased to introduce this special issue of the *Indiana Law Review* and to provide some reflections on the progress women have made under the law and as lawyers during my lifetime. Let me begin by inviting you to travel with me to Washington, D.C., to my current place of work, but back to a day in the United States Supreme Court long before modern times, way back to the year 1853. Sarah Grimke, great feminist and anti-slavery lecturer from South Carolina, was in the Capital City that December, and wrote this to a friend describing her visit:

Yesterday, visited the Capitol. Went into the Supreme Court, not in session. Was invited to sit in the Chief Justice's seat. As I took the place, I involuntarily exclaimed: "Who knows, but this chair may one day be occupied by a woman." The brethren laughed heartily. Nevertheless, it may be a true prophecy.¹

Today, no one would laugh at that prophecy.

More than a generation ago, in a comment about the treatment of women by the law and in law schools, I remarked on lawyers' "awakening consciousness" to the prevalence of sex-based discrimination.² This issue of the *Indiana Law Review*, superintended by the first all-female Executive Board, reveals the large progress made in the intervening years.

My savvy, sympatique colleague and counselor, first woman appointed to the U.S. Supreme Court, Justice Sandra Day O'Connor, confirms a report familiar to students who attended law schools in the 1950s, even in the 1960s. Justice O'Connor graduated from Stanford Law School in 1952 in the top of her class. Our Chief Justice, William Rehnquist, was in the same class, and he also ranked at the top. Young Rehnquist got a Supreme Court clerkship, then, as now, a much sought-after job for young lawyers. No opportunity of that kind was open to Sandra Day. Indeed, no private firm would hire her to do a lawyer's work. "I interviewed with law firms in Los Angeles and San Francisco," Justice O'Connor

* Associate Justice, Supreme Court of the United States. I acknowledge, with appreciation, the aid of my 1998 Term law clerk, Alexandra Edsall, in composing these remarks.

1. Letter from Sarah Grimke to Sarah Wattles (Dec. 23, 1853) (Weld-Grimke Papers, William L. Clements Library, University of Michigan).

2. Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 Val. U. L. Rev. 480 (1971).

recalls, "but none had ever hired a woman as a lawyer."³ Many firms were not prepared to break that bad habit until years after the U.S. civil rights legislation of the mid-1960s made it illegal.⁴

In the last years of the 1960s—at the same time that a widely-used property law casebook declared: "Land, like women, was meant to be possessed"⁵—movements to revise the law's treatment of women began. I was then a professor of law at Rutgers, New Jersey's state university. When new kinds of complaints began to trickle into the New Jersey affiliate of the American Civil Liberties Union, the Executive Director of the New Jersey ACLU referred the novel inquiries to me. Among the brave new complainants, I will mention a typical few.

There was Eudoxia Awadallah, who taught typing and stenography at a secondary school in the vicinity, and was told even before her pregnancy began to show that she must go on maternity leave immediately. (Maternity leave, you should understand, was then a euphemism in the United States—it was unpaid, and there was no guaranteed right to return to work. If and when the school district wanted you back, the school would call.⁶)

Another worked at the Lipton Tea Company. She wanted to sign up for health insurance for her entire family because the package of benefits at her work place was more generous than the one offered by her husband's employer. Married women, however, could get group insurance only for themselves, not for spouse or children.

Princeton University was running an exemplary summer program to introduce local elementary school students to math and science in an appealing way—an enriched on-campus July and August program, with follow up for several school years thereafter. The program was called Summer in Engineering; it was opened to 11- and 12-year-old *boys*. Girls could not be included, the University said, because girls distract boys from their studies.

Around 1970, women students at Rutgers Law School whose consciousness of sex discrimination had awakened at least as much as mine, young women encouraged by a vibrant movement in the United States for racial equality, asked for a seminar on Women and the Law. I went off to the library. There, in the space of a month, I read every U.S. court decision *ever* published involving women's legal status, and every U.S. law journal commentary in point. That was not a very taxing undertaking. There were few commentaries and not many decisions, probably less altogether than today accumulates in six months time.

3. PETER W. HUBER, SANDRA DAY O'CONNOR: SUPREME COURT JUSTICE 33 (1990).

4. Jeanette Reibman, one of two women who graduated from Indiana University School of Law in 1937, recalled similar barriers. When she looked for jobs in Washington, D.C., she "got more offers for dates than . . . for jobs." *Former Senator Urges Local Women: "Make It Your World,"* LANCASTER NEW ERA, Nov. 4, 1995, at A6. Reibman went on to serve seven terms in the Pennsylvania State Senate and reflected upon retirement that many of the initiatives she had pioneered would not have been accomplished, "if I hadn't been there fighting tooth and nail." *Id.*

5. CURTIS J. BERGER, LAND OWNERSHIP AND USE 139 (1968).

6. *See, e.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634-35 (1974).

I was engaged in preparing materials for the seminar when the Legal Director of ACLU's National Office, Melvin L. Wulf, visited Rutgers. The U.S. Supreme Court had just agreed to review an Idaho state court's judgment in a case called *Reed v. Reed*.⁷ The complainant, Sally Reed, was the mother of a teenage boy who, in a tragic occurrence, had used his father's gun to commit suicide. The parents were separated, and Sally Reed wanted to be appointed administrator of her son's death estate. But the father was appointed instead, pursuant to a State of Idaho statute that read: As between persons "equally entitled to administer" a decedent's estate, "males must be preferred to females." The ACLU had filed the request for Supreme Court review in Sally Reed's case, and I asked if I could write the brief on the merits. *We* will write the brief, ACLU Legal Director Mel Wulf said, and so we did, with the grand aid of students from Yale, New York University, and Rutgers. (I learned in that venture how important it is to include men in the effort to make women's rights part of the human rights agenda. Without the understanding of all humankind, as I see it, the effort cannot succeed.)

Sally Reed's petition proved the turning point case, the first time in the history of the United States that any law ordering differential treatment of women and men was declared unconstitutional. After that 1971 decision, and until 1980, the year I became a U.S. Court of Appeals judge, the business of ridding the statute books of laws that discriminate on the basis of sex consumed most of my days.

In the affirmative action wave that hit colleges and universities in the United States at the start of the 1970s, during President Nixon's first term, I received an invitation to join the law faculty at Columbia University, and was pleased to switch to a school close to my home in New York City. My very first month at Columbia, in September 1972, the University sought to save money in the housekeeping department. Columbia sent lay off notices to 25 maids—and not a single janitor. (Maids were women, janitors were men, but their jobs were not vastly different.) I entered that fray, which happily ended with no lay offs, and, as I recall, the union's first female shop steward.

Hardest of my extracurricular activities for my Columbia University and Law School colleagues to bear was the litigation that followed after a tea at the home of Madame Wu, world-celebrated professor of chemistry. The tea took place on a clear winter day in the mid-1970s; the invitees were all the senior women at Columbia University. (Eleven women had achieved that rank in the mid-1970s, compared to over 1000 men.) One of the 11, Carol Meyer, Professor at the School of Social Work, wrote about the meeting years later. She was more than a little suspicious when she received the invitation, which came from me. "Women meeting together? Was this to be a socialist—or worse, Communist—cell meeting of some kind," she wondered.⁸ What we discussed, primarily, was the sex differential then part of the University's retirement plan,

7. 404 U.S. 71 (1971).

8. Carol H. Meyer, *On Feminism in Action: The First Activist Feminist I Ever Met*, 9 AFILLIA 85 (1994).

under which women received lower monthly retirement benefits because, on average, women live longer than men.

Eventually, a case charging unlawful discrimination was filed, with some 100 Columbia women—teachers and administrators—as named complainants. In a parallel case, one from California, the U.S. Supreme Court settled the issue, in favor of the women.⁹ Several—probably most—of my Columbia Law School faculty colleagues would have voted the other way, but their spirited discussions helped me sharpen a friend of the court brief filed on the winning side. In that matter, as in many others—I recall particularly an earlier episode involving a request to extend health benefits to cover pregnant employees—I was shielded from accusations of disloyalty to the University by law school deans and colleagues who—although they did not inevitably agree with me on the merits—recognized the value of having the questions fully aired.

In 1980, I moved from the academy to the judiciary, an area in which women have also made substantial advances. When President Carter sought, for the first time in our Nation's history, to place women, in numbers, on the federal bench, he rightly recognized that merit was the key to opening doors. In place of "old boy networks," he encouraged broader search methods, including senatorial nominating committees for district court judgeships, and he established his own nominating commissions for appeals court vacancies. With the aid of more open nominating procedures, he achieved his goal—to make appointments reflective of the excellence of lawyers of diverse strains in our population. The increasing presence of women on the bench struck me with particular force in 1990, when I sat with Chief Judge Patricia Wald and Judge Karen Henderson on the D.C. Circuit's first all-female panel.¹⁰

Women have continued to become judges in increasing numbers. Women constitute close to 30% of President Clinton's appointees to the federal bench, 79 women out of 274 total appointments as of July 1998, to be precise.¹¹ A critical mass, social scientists might say. Are we really there? Well, not quite, I am reminded with some regularity when advocates—occasionally even other justices—call me Justice O'Connor. Task forces on gender bias in our state and federal courts have helpfully revealed the existence of often unconscious prejudice; gender bias studies have prompted those who work in our courts to listen to women's diverse voices, then to accord women's inquiries and proposals the respect and attention customarily accorded questions and ideas advanced by men.¹²

As women join men in diverse fields of endeavor, as lawyers, judges, engineers, bartenders, computer programmers, we are discovering that

9. See *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

10. See *Microimage Display Division v. NLRB*, 924 F.2d 245 (D.C. Cir. 1991).

11. Figures supplied by the U.S. Department of Justice.

12. See, e.g., Ruth Bader Ginsburg, *Foreword to Report of the Special Committee on Gender, Prepared for the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1651 (1996); Ruth Bader Ginsburg, *Foreword to Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts* (forthcoming).

personality characteristics for both sexes span a wide range. Theoretical discussions are ongoing today—particularly in academic circles—about differences in the voices women and men hear, or in their moral perceptions. When asked about such things, I usually abstain—or fudge. Generalizations about the way women or men are—my life's experience bears out—cannot guide me reliably in making decisions about particular individuals. At least in the law, I have found no natural superiority or deficiency in either sex. In class or in grading papers from 1963 until 1980, and now in reading briefs and listening to arguments in court for over 18 years, I have detected no reliable indicator of distinctly male or surely female thinking—or even penmanship.

The exhilarating changes I have seen lead me to conclude on a high note. A long distance has been traveled from the 1950s to the 1990s. A few years ago, in a tribute to Justice Sandra Day O'Connor, United States District Judge Kimba Wood, of the Southern District of New York, wrote: "Justice O'Connor's appointment to the U.S. Supreme Court was a momentous event."¹³ But Sandra's greatest achievement, Judge Wood said, is one from which great numbers of women lawyers have benefited and now have the responsibility to further advance—to make women's participation in all manner of legal work "not momentous, but commonplace."¹⁴

13. Kimba M. Wood, *A Tribute to Sandra Day O'Connor*, in 1996 ANN. SURV. AM. L. xlviii, xlviii.

14. *Id.* at li.

ARTICLES

EXAMINING RACE AND GENDER BIAS IN THE COURTS: A LEGACY OF INDIFFERENCE OR OPPORTUNITY?

MYRA C. SELBY*

"The true worth of a race must be measured by the character of its womanhood."¹

In his 1999 State of the Union address, President William Jefferson Clinton recognized a great heroine of the Civil Rights' movement, Rosa Parks.² Parks, in 1955, refused to give up her seat on the bus in Montgomery, Alabama, in violation of one of the restrictive Jim Crow laws.³ At the address, Parks sat in the House Chamber with First Lady, Hillary Rodham Clinton. When recognized, this quiet, diminutive eighty-six-year-old woman rose and nodded to thunderous applause from everyone in the Chamber. As we approach the millennium, it seems appropriate to look back on the pathways that led us to this point. Rosa Parks' brave act on that Alabama bus, and similar heroic acts by others, led to pinnacle Supreme Court civil rights cases that marked the end of Jim Crow laws.⁴

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1. Mary McCleod Bethune, A Century of Progress of Negro Women, Address Delivered Before the Chicago Women's Federation (June 30, 1933), in MARY MCCLEOD BETHUNE, PAPERS 1923-1942 (Amistad Research Center, New Orleans).

2. President William Jefferson Clinton, State of the Union Address, Address at the United States Capitol (Jan. 19, 1999) <<http://www.dlcppi.org/speeches/99sotu.htm>>.

3. See *id.* Jim Crow laws first arose after the Civil War in the 1880s. 6 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 249 (1998) [hereinafter WEST'S ENCYCLOPEDIA]. These laws served to segregate the races in every respect. See *id.* at 249-50. One of these laws required blacks to sit in the back section of the bus, and to relinquish their seats to white passengers if all seats were filled. 8 *id.*, at 19.

4. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), and finding unconstitutional the separate-but-equal educational facilities); *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (finding that the educational opportunities for black and white law students in Texas were not substantially equal and violated the Equal Protection Clause of the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding that restrictive covenants precluding land ownership or occupancy on the basis of race were unenforceable); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (ruling that interstate bus

While these successes should be celebrated, the larger goal of racial and gender equality remains a continuing struggle. The rich history of civil rights opinions in America teaches us that the judiciary plays an important role in the quest for equality. Americans look to the judiciary to vindicate their rights and protect their individual freedoms.

State supreme courts are well situated to foster race and gender fairness in the judicial system. Many state high courts have taken the opportunity to lead in this area and have organized formal mechanisms to discover and address bias and its related problems. Indiana remains in the small number of states lacking a systematic, formal approach to addressing race and gender bias in the courts. While our courts may recognize the evils of bias and acknowledge the existence of racist and sexist attitudes, there has been no statewide, coordinated effort to effect change.⁵ It is my belief that the lack of action grows out of an apparently benign notion—that of indifference. Indiana has not joined the ranks of states whose courts are working on these issues through the use of commissions, task forces, and the like, not because our judicial branch opposes such efforts, but because the issue of bias simply is not a priority. The danger of such indifference is that it breeds intolerance. Thus, we must ask ourselves as we approach the new millennium—do we leave for the next generation a legacy of indifference?

This Article briefly reviews the evolution of race and gender bias task forces in state courts, beginning with the resolution passed by the Conference of Chief Justices⁶ in 1988, the establishment of numerous state task forces, the general problems identified by these task forces, and the results of some of the work undertaken by them. Following this summary, the Article examines what has occurred in Indiana concerning the issue of bias in the courts.

In 1988, the Conference of Chief Justices⁷ signaled their commitment to

passengers are not required to adhere to segregation laws when traveling through the different states); *Smith v. Allwright*, 321 U.S. 649, 661-62 (1944) (holding that political parties could not ban voters from primary elections because of their race).

5. While Indiana courts have taken steps to improve civility among attorneys, I believe concerns about bias and discrimination are more properly addressed separate and apart from the rubric of civility and professionalism.

6. The Conference of Chief Justices is a semi-annual meeting where the chief justices of each state gather to exchange ideas, practices, and policies to improve all aspects of the states' judicial systems.

7. The mission of the Conference of Chief Justices, adopted in 1995, is to improve the administration of justice in the states, commonwealths and territories of the United States. The Conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- develop, exchange and disseminate information and knowledge of value to state judicial systems;
- educate, train, and develop leaders to become effective managers of state judicial systems;

fairness in the courts by adopting Resolution XVIII, entitled *Task Forces on Gender Bias and Minority Concerns*,⁸ encouraging all chief justices to establish task forces devoted to the study of gender bias and minority concerns as they relate to the judicial system. At the time, four states had already created task forces to address racial and ethnic bias including, New Jersey (1984), Michigan (1987), New York (1987) and Washington (1987).⁹ Eight states, including California (1986), Maryland (1986), Massachusetts (1987), Michigan (1987), Minnesota (1987), New Jersey (1982), New York (1984), and Utah (1986), also had formed gender task forces prior to this Resolution.¹⁰ In 1993, the Conference adopted another resolution “[u]rging [f]urther [e]fforts for [e]qual [t]reatment of [a]ll [p]ersons.”¹¹ Yet again in 1997, the Conference reaffirmed its commitment to Resolution XVIII and resolved that “the chief justices in those states that have not already done so . . . [should] establish task forces or commissions.”¹²

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- promote the vitality, independence and effectiveness of state judicial systems;
 - develop and advance policies in support of common interests and shared values of state judicial systems; and
 - support adequate funding and resources for the operations of the state courts.

Mission Statement, Conf. of Chief Justices (1995) (on file with the author).

8. *Task Forces on Gender Bias and Minority Concerns*, Res. XVIII, Conf. of Chief Justices, Discrimination in the Courts Committee, 40th Ann. Meeting (1988) [hereinafter Resolution XVIII] (on file with the author).

9. See Appendix.

10. See *id.*

11. *Urging Further Efforts for Equal Treatment of All Persons*, Conf. of Chief Justices, 16th Mid-Year Meeting (1993) [hereinafter 1993 Resolution] (on file with the author). The 1993 Resolution, with its emphasis on all persons, is a clear recognition that bias in the courts is not confined to gender and minority concerns. References to race and gender bias throughout this Article are intended to embrace the language of the 1993 Resolution.

12. *Reaffirming the Commitment of Resolution XVIII: The Establishment of Task Forces and Commissions on Access and Fairness in the State Courts*, Res. XIII, Conf. of Chief Justices, Access and Fairness Committee, 49th Ann. Meeting (1997).

In May 1999, the Conference of Chief Justices, Conference of State Court Administrators, American Bar Association and League of Women Voters co-sponsored the National Conference of Public Trust and Confidence in the Justice System (“Conference”). See Joan Biskupic, *Justice O’Connor Calls for “Concrete Action” to Fight Bias*, WASH. POST, May 16, 1999, at A5. The Conference was charged with identifying circumstances that affect public trust and confidence in the state court systems and developing strategies to address them. See Memorandum, Backgrounder for the National Conference on Public Trust and Confidence in the Justice System (May 14, 1999). One notable survey finding was that 68% of blacks and 42% of Hispanics and non-Hispanic whites perceive that blacks are treated unfairly in the judicial system. See Biskupic, *supra*, at A5. In response to these and other findings, Justice Sandra Day O’Connor stated in her concluding remarks to the Conference: “‘Clearly this is a problem that has to be address[ed]; . . . [c]oncrete action must be taken’ to erase racial bias.” *Id.* (quoting Justice Sandra Day O’Connor). In light of the findings

Today, approximately twenty-seven state supreme courts have developed a task force to address racial and ethnic bias and thirty-nine state supreme courts have formed a task force to address gender bias in the judicial system.¹³ Indiana is not among either group of states. Not surprisingly, these task forces have identified many instances of institutional bias, with many of the same concerns being shared amongst the states. After many hours of investigation and study, these task forces compiled substantial data demonstrating the circumstances and extent of bias found in the judicial system. This data includes many anecdotes describing personal experiences or perceptions of race and gender bias. While the content of many of the stories is shocking, the fact that they occur is not. To illustrate that race and gender bias endures in state courts, the following are just some examples of bias found by the task forces in Connecticut, California, Delaware and Texas.

In Connecticut, instances of racial bias are well documented. The Connecticut Judicial Branch Task Force found bias in judicial attitudes. For example, one judge said: "Hiring is not a source of bias; the problem is to get minority people to take the positions."¹⁴ Another judge assumed that a black defendant was a drug dealer because the defendant was wearing a beeper even though he carried the beeper for legitimate business purposes.¹⁵ Another defendant wearing a bright jacket was asked: "'So what gang are you in?'"¹⁶ One person believed that

"[t]he minority kid is more likely to get high bail on a drug charge than a white kid whose parents come to court, bring report cards, and demonstrate roots in the community on the grounds that this provides more evidence to prove the kid is not a danger to the community. I feel that because the white teenager in fact had more economic and social opportunities, this should add to his crime, not excuse it."¹⁷

Connecticut formed focus groups as part of the investigatory process. These focus groups described many instances of disparate treatment, such as when Caucasian defendants are given accelerated rehabilitation for more serious crimes while minorities receive incarceration for less serious crimes.¹⁸ These focus groups also perceived that the race of both the defendant and the victim in criminal cases determined the severity of the sentence.¹⁹

of this very recent conference as well as the findings of at least 27 state court task forces on race bias, state high courts cannot ignore the growing body of evidence demonstrating that bias is a problem—perceived or real—within the justice system.

13. See Appendix.

14. STATE OF CONN. JUDICIAL BRANCH TASK FORCE ON MINORITY FAIRNESS, FULL REPORT 52 (1996) [hereinafter CONN. MINORITY FAIRNESS REP.].

15. See *id.* at 21.

16. *Id.*

17. *Id.* at 36.

18. See *id.* at 39.

19. See *id.* The Seventh Circuit Judicial Council created a Race and Gender Fairness

The Judicial Council of California Advisory Committee on Gender Bias in the Courts similarly identified many instances of race bias. One judge referred to Hispanics as “cute little tamales,” “Taco Bell,” “spic,” and “bean” in conversations with court personnel.²⁰ The *Los Angeles Daily Journal* reported that African American citizens of California are seven times more likely to be arrested, nine times more likely to be sent to prison, and twelve times more likely to be sentenced to death than their Caucasian counterparts.²¹ The *San Jose Mercury News* criticized the California judiciary and its inability to provide competent court interpreters to serve the nation’s largest immigrant state.²²

Instances of gender bias are equally prevalent. The Connecticut Task Force on Gender, Justice, and the Courts found many instances of gender bias in the judiciary. One female attorney reported that some judges repeatedly addressed them by their first names while male attorneys were addressed by their surnames or titles.²³ Another judge opens court by stating: “Good Morning Gentlemen.”²⁴ Yet another judge questioned a victim who was assaulted by a former boyfriend: “You went where with him? What was your major in college? Psychology! Then why didn’t you know better?”²⁵ Furthermore, an attorney reported that a judge told a female attorney at the courthouse that: “[She would] be as busy as a bride’s ass on her wedding night.”²⁶

The Connecticut Task Force also discovered gender bias in attorneys’

Committee in October 1993 to promote fairness in the federal judicial system. See Collins T. Fitzpatrick, *Seventh Circuit: Fairness in the Federal Courts*, 32 U. RICH. L. REV. 725, 726 (1998). However, in 1994 Congress declined to appropriate funds for such studies. See *id.* at 727. In response, the Judicial Council adopted a resolution requesting the courts within the circuit, including Indiana federal courts, to create their own task forces to assess racial and gender fairness in the circuit’s court system. See *id.* at 728. While a few courts elected not to create committees, most courts maintain active committees that are conducting their own studies on the matter. See *id.* at 729.

20. JUDICIAL COUNCIL OF CAL. ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS, FINAL REPORT 424 (1996) [hereinafter ACHIEVING EQUAL JUSTICE IN CAL. COURTS] (quoting *In re Stevens*, 31 Cal. 3d 403, 405 (1982)).

21. See *id.* at 425 (citing *State Legal System Riddled with Racial Distinctions*, L.A. DAILY J., Mar. 9, 1988, at 6); see also Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 113 (1988) (discussing racial discrimination in the criminal justice system).

22. See ACHIEVING EQUAL JUSTICE IN CAL. COURTS, *supra* note 20, at 431 (citing *How Court Interpreters Distort Justice*, SAN JOSE MERCURY NEWS, Dec. 17, 1989, at 1).

23. CONNECTICUT TASK FORCE ON GENDER, JUSTICE AND THE COURTS REPORT, REPORT TO THE CHIEF JUSTICE, 65 (1991) [hereinafter CONNECTICUT GENDER & JUSTICE REP.]. See also THE DELAWARE GENDER FAIRNESS TASK FORCE, FINAL REPORT 43 (1995) [hereinafter DELAWARE GENDER FAIRNESS REP.].

24. CONNECTICUT GENDER & JUSTICE REP., *supra* note 23, at 63.

25. *Id.* at 76.

26. *Id.* at 66.

conduct. For example, an attorney was reported to have hounded a fifteen-year-old girl on the witness stand by saying: "Come on, you can tell me. You're probably just worried that your boyfriend got you pregnant right? Isn't that why you're saying he raped you?"²⁷ A female attorney in Connecticut poignantly described her feelings about gender bias when she said: "Tell the judges we are not their wives, we are not their daughters, we are not their girlfriends, we are not their mothers. Whatever we may be outside the court is one thing. In the courtroom, in the courthouse, we are attorneys."²⁸

The Delaware Gender Task Force disclosed numerous incidents of gender bias in the judiciary and profession in its Final Report. One judge professed to have no reservations about commenting on a female attorney's attire during the course of a hearing.²⁹ Yet another judge was reported to have asked a female attorney, preceding a courtroom teleconference, whether she wanted to sit on his lap.³⁰ A female attorney recalled the time when a judge first asked her age and then stated: "[Your employer] only hires young, pretty girls."³¹ The Delaware Gender Task Force also found that attorneys exhibited biased behavior on many occasions. For example, a female attorney was asked by an older male attorney during a job interview whether it was her intention to pursue a career in law.³² The male attorney explained that while he did not similarly ask this question of male applicants, he did not wish to hire a woman interested in having a family in the near future.³³ Another female attorney had been asked during several different interviews about her husband's occupation and whether he approved of her choice of profession and its time requirements.³⁴ Yet another female attorney believed that when a prominent male attorney during an interview stated: "I like what I see," he was not referring to her résumé.³⁵ One female attorney was advised by a senior partner during an interview that "she . . . [should] wear dresses because it is a man's world and if a woman has looks she should use them to her advantage."³⁶ The same partner scheduled an interview with another female attorney simply to see what she looked like.³⁷

The Gender Bias Task Force of Texas reported many of the same types of gender bias found in the previous states. One Texan attorney reported that a judge not only asked her the color of her nipples, but also asked her in front of male attorneys.³⁸ Another female attorney in Texas stated that she had endured

27. *Id.* at 75.

28. *Id.* at 5.

29. *See* DELAWARE GENDER FAIRNESS REP., *supra* note 23, at 61.

30. *See id.* at 62.

31. *Id.* (alteration in original).

32. *See id.* at 105.

33. *See id.*

34. *See id.*

35. *Id.*

36. *Id.* at 105-06.

37. *See id.* at 106.

38. *See* STATE BAR OF TEXAS GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT 31 (1994)

many condescending inquiries about “whether [she] was having a bad hair day, broken fingernail day or a run in my stockings” when her mood was tempered.³⁹ The Gender Bias Task Force of Texas also reported male attorneys’ perceptions of gender bias in the judicial system. One male attorney in Texas stated that “[w]omen get away with murder in court as well as everywhere else. Men suffer great discrimination in divorce cases.”⁴⁰ One attorney believed that “[t]he so-called “gender-gap” is vastly over-blown. If people who enter the arena will concentrate on their job and get the chip off their shoulders, forgetting their sex, they should do fine in today’s society.”⁴¹ To the point, another male attorney similarly stated: “This survey is a waste of time [and] money. Women should grow up and stop whining.”⁴² One attorney admitted that “[j]udges and lawyers that are male discriminate against women and women lawyers. I try not to do so, but I find myself doing so anyway quite often.”⁴³

The previous anecdotes serve to demonstrate that bias is alive and well across our country. As one Delaware attorney astutely commented:

“Any one of these kinds of experiences is perhaps not all that earth-shattering. But those who dismiss these incidents fail to appreciate the cumulative effect that incidents like these have when they happen on a frequent basis. Not only do such remarks and attitudes get tiresome but they require a considerable expenditure of energy worrying about how you are being perceived. They also tell you that you are seen first as a sexual/social being rather than respected as a professional colleague.”⁴⁴

The force of the evidence clearly suggested that these are not simply the utterances of a few “bad eggs,” but frequent occurrences at all levels of the judicial system that immeasurably harm the ability of courts to administer justice.⁴⁵ As a result, many states have chosen to address race and gender bias

[hereinafter TEXAS GENDER BIAS REP.].

39. *Id.*

40. *Id.* at 20.

41. *Id.* at 25.

42. *Id.*

43. *Id.* at 19.

44. DELAWARE GENDER FAIRNESS REP., *supra* note 23, at 52.

45. The problem of race bias in the legal profession as a whole was recently highlighted in the *American Bar Association Journal* in its special report entitled *Race and the Law*, jointly published by the American Bar Association and the National Bar Association. *Race and the Law*, A.B.A. J., Feb. 1999, at 44. Several articles touch on both race and gender bias in the courts. See Philip S. Anderson, *Striving for a Just Society*, A.B.A. J., Feb. 1999, at 66 (proposing that lawyers, through education and understanding, must lead Americans in the effort to eradicate bias); Debra Baker, *Waiting and Wondering*, A.B.A. J., Feb. 1999, at 52 (examining how politics expedites or hinders the judicial nomination process); Derek Bok & William G. Bowen, *Access to Success*, A.B.A. J., Feb. 1999, at 62 (suggesting that the educational benefits of diversity justify race-sensitive educational admission programs); Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42 (describing the differing perceptions of the extent of race bias in the justice system); John

by implementing the recommendations of their respective task forces. While some states have unique circumstances to address, many common themes can be gleaned from the task force recommendations. Some of the changes are described below.

Several task forces focused their attention on revising or amending rules that govern the conduct of judges, lawyers, and court employees. Some states now prohibit judges from engaging in any racially or sexually biased conduct or maintaining memberships with any organization that discriminates on the basis of race or sex.⁴⁶ The Rules of Professional Conduct similarly address lawyer behavior.⁴⁷ Some states have developed extensive court employee handbooks describing, for example, race and gender discrimination complaint procedures,

Gibeaut, *Marked for Humiliation*, A.B.A. J., Feb. 1999, at 46 (discussing the problems surrounding racial profiling); Mark Hansen, *And Still Miles To Go*, A.B.A. J., Feb. 1999, at 68 (describing the ABA Commission on Opportunities for Minorities in the Profession and its efforts); Arthur S. Hayes, *Color-Coded Hurdle*, A.B.A. J., Feb. 1999, at 56 (identifying the unique problems that women of color face in predominately white firms); Michael Higgins, *Accomplishing Equality*, A.B.A. J., Feb. 1999, at 69 (describing the work of the Council on Racial and Ethnic Justice); Michael Higgins, *Few Are Chosen*, A.B.A. J., Feb. 1999, at 50 (identifying the difficulties of obtaining a jury of one's peers); Cliff Hocker, *Making the Majors*, A.B.A. J., Feb. 1999, at 58 (describing the difficulties minority attorneys face when pursuing a career as corporate counsel); Cliff Hocker, *Powerhouse For Civil Rights*, A.B.A. J., Feb. 1999, at 70 (describing the focus and accomplishments of the National Bar Association); Steven Keeva, *Pursuing the Right to Breathe Easy*, A.B.A. J., Feb. 1999, at 48 (depicting the struggle to prohibit polluting facilities from locating operations in poor and minority neighborhoods); Wendell Lagrand, *Getting There, Staying There*, A.B.A. J., Feb. 1999, at 54 (discussing the hurdles and strategies for most African-American attorneys in achieving partner); Beverly McQueary Smith, *Uniting to Ensure Fairness*, A.B.A. J., Feb. 1999, at 67 (offering that lawyers in bar associations can join efforts to eliminate racial bias); Linn Washington, Jr., *Bringing More Blacks to Clerking*, A.B.A. J., Feb. 1999, at 60 (discussing the low number of minorities serving as judicial clerks); Gilda R. Williams, *Key Words for Equality*, A.B.A. J., Feb. 1999, at 64 (advocating that affirmative action programs are still needed to counteract years of discrimination).

46. Courts have cited state task force reports as authority for identifying inappropriate gender biased conduct. See, e.g., *Surratt v. Prince George's County*, 578 A.2d 745, 757 (Md. 1990) ("We are aware that some judges are reported to 'make verbal or physical sexual advances in the course of the professional interaction.'" (quoting MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 125 (1989))); *State v. Mascarella*, No. 94AP100075, 1995 WL 495390, at *5 (Ohio Ct. App. July 6, 1995) (citing portion of Ohio Joint Task Force on Gender Fairness Final Report that recommends that courts address female court participants by their formal name); *In re James L. Barr*, No. 67, 1998 WL 58975, at *6 (Tex. Rev. Tribunal Feb. 13, 1998) (referencing the Gender Bias Task Force of Texas Final Report as support for removing judge from office for gender biased conduct). A growing body of case law is developing in the states that have adopted rules prohibiting judges, court personnel, and attorneys from engaging in gender-biased conduct. See LYNN HECHT SCHAFFRAN ET AL., NATIONAL JUD. EDUC. PROGRAM, GENDER FAIRNESS STRATEGIES PROJECT: IMPLEMENTATION RESOURCES DIRECTORY 12-16 (1998) [hereinafter IRD].

47. IRD, *supra* note 46, at 29-32.

diversity training requirements, flexible work schedules, standards for interviewing job applicants, gender-neutral language requirements, and sexual harassment policies.

Some states have developed comprehensive educational programs to train court personnel at all levels of the judicial system. For instance, educational programs have been created for court personnel, judges, judicial disciplinary commissions, judicial nominating commissions, and lawyers.⁴⁸ Other educational programs extend beyond the court system and target law enforcement agencies and the public.⁴⁹

Several states enacted legislation to address race and gender bias in substantive areas of the law. States often reviewed and amended statutes involving child abuse and neglect, child support, divorce, domestic violence, family law, guardians ad litem, rape and sexual assault, sentencing and prison, and spousal support to eliminate the possibility of biased results.⁵⁰ States also amended statutes and rules to reflect gender-neutral language.⁵¹

Even without the detailed self-examination of a task force or commission, it is fair to say that Indiana, in all likelihood, has the same or similar problems of race and gender bias in the courts as the many states that have engaged in formal study. This could prompt Indiana to look into bias in its judicial system, such as has been the case with other state court task forces over the last decade, or we can simply benefit from the growing body of data gleaned from the existing task forces and use it as a starting point to improve upon. Regardless of how we begin the discussion, the work of many state courts and other entities⁵² makes it clear that self-examination is imperative to the goal of ending bias in the courts. Committing to the hard work that is necessary for a meaningful task force effort is the first step.

Justice Ruth Bader Ginsburg described the benefits of a court's inward look:

Self-examination of the courts' facilities and practices . . . can yield significant gains. First, such projects enhance public understanding that gender equality is an important goal for a Nation concerned with full

48. *Id.* at 41, 54-80.

49. *Id.* at 76, 81-83.

50. *Id.* at 111-43.

51. *Id.* at 84-85.

52. The National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts is a cooperative of task forces and other organizations that was formed "to provide participating groups an opportunity to discuss and share research and program activities relating to their common mandate to determine the existence of bias in the courts and to recommend and implement action to overcome it." NATIONAL CONSORTIUM OF TASK FORCES AND COMMISSIONS ON RACIAL AND ETHNIC BIAS IN THE COURTS 16 (1998). The National Association of Women Judges, the National Judicial College, the National Center on State Courts, the ABA Commission on Women in the Profession and the National Judicial Education Program have coordinated efforts to consolidate gender bias information through the Gender Fairness Strategies Project. See generally IRD, *supra* note 46.

utilization of the talents of all of its people. Second, self-examination enables an institution to identify, and devise means to eliminate, the harmful effects of gender bias. Third, close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women's voices, and to accord women's proposals the respect customarily accorded ideas advanced by men. And finally, self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.⁵³

Justice Ginsburg rightly identifies the benefits of the self-examination process as fostering public understanding of the importance of equality, permitting the judiciary to identify bias and devise means to eliminate it, causing persons involved in the judicial system to pay attention to their behavior, and encouraging progress toward eradicating racial and gender discrimination.

It is essential that the judicial system convey to the public its appreciation for the goal of racial and gender fairness. Our nation has long been struggling with racial and gender discrimination and it may be that we will never see that perfect day when such attitudes do not exist. However, the judiciary, charged as it is with protecting individual rights, has a heightened level of responsibility to foster and promote equality. The judiciary must lead the effort to achieve unprecedented fairness in the judicial system and demonstrate to the public that these issues are not only real, but demand serious attention. Moreover, implementation of anti-discrimination policies and procedures requires judges, attorneys, bailiffs, clerks, and litigants to conform their behavior, if not their beliefs, to acceptable standards. The hope is that while racial and gender bias may linger in society at large,⁵⁴ the judicial system would be insulated from such devastating and counter-productive beliefs and perceptions. Furthermore, improved public perception of the judicial system as a whole may result from such efforts.

Conduct that causes women and persons of color to conclude that bias exists in the court system may be more systemic than individualized. While instances of overt bias certainly do occur, the larger problem stems from behaviors that, while not overtly biased, create the perception of bias. Examples of such inadvertent attitudes and behaviors include mistaking a lawyer for a secretary or

53. Ruth Bader Ginsburg, *Foreword to THE GENDER, RACE AND ETHNIC BIAS TASK FORCE PROJECT IN THE D.C. CIRCUIT* (1995), reprinted in 84 GEO. L.J. 1651, 1651-52 (1996). While this excerpt specifically addresses gender bias, its meaning applies equally to all bias.

54. Instances of racism and sexism in society surface virtually on a daily basis. Recently, an Illinois character and fitness panel found Matthew Hale unfit to practice law because of his outwardly racist views. See Pam Belluck, *Avowed Racist Barred From Practicing Law*, N.Y. TIMES, Feb. 10, 1999, at A12. The panel concluded that Mr. Hale is "'free, as the First Amendment allows, to incite as much racial hatred as he desires and to attempt to carry out his life's mission of depriving those he dislikes of their legal rights. But in our view he cannot do this as an officer of the court.'" *Id.* Mr. Hale is challenging the panel's decision. See *id.*

staff person, stereotyping criminal defendants by their type and manner of dress and generally regarding members of a particular minority or ethnic group as defendants. Individual instances such as these probably will not warrant a full scale investigation and discipline, but will result in unchecked behavior leading to the perception of bias.

Some may resist the creation of task forces due to the belief that complaints of racial or gender bias are adequately managed by the lawyer and judge disciplinary commissions. Assuredly, these bodies certainly do see such complaints, but disposing of racial or gender bias complaints in this manner is an "after-the-fact" approach to the problem. It simply will not work if the goal is institutionalized fairness.

After identifying biased practices and policies within the judicial system, the judiciary must then publish its findings. Disseminating information about the character and manifestations of bias is an important mechanism for addressing racial and gender bias. By calling the public's attention to the existence of bias and expressing a willingness to sanction such bias, the judiciary forces court participants, court employees, lawyers, and judges to modify their behavior. Thereafter, disciplinary measures and sanctions may be used to ensure conformance.

In the end, changing habitual modes of biased thinking and behavior requires an active and concerted effort. While state and local bar associations have made substantial in-roads toward addressing race and gender bias in the legal profession, to achieve a judicial system free of race and gender bias, it is axiomatic that the effort begin at the highest level. State supreme court sponsored race, gender or fairness task forces are the starting point. The overall purpose of these high court sponsored task forces and committees is to institutionalize systems and behaviors that are free of bias.

Institutionalization occurs as new informal norms of behavior with respect to gender [and race] bias become formally incorporated into judicial codes of conduct, rules of professional conduct and other written codes of conduct established by the state or court system. Through such prescriptions and proscriptions, usually sanctionable, the behavior of group members is shaped and maintained.⁵⁵

The impact of institutional reform through these state supreme court-sponsored task forces can be found in any of the states that are now enjoying the benefits of their work.

Each state's highest court is the best entity to shape the judicial system. States' high courts are ultimately responsible for the conduct of participants within the judicial system. Through rules governing court proceedings as well as lawyer and judge conduct, the high courts establish the boundaries of permissible conduct.

The establishment and maintenance of a task force is an involved process and requires the high court to play an active role. For example, the Chief Justice of

55. IRD, *supra* note 46, at 22.

the Connecticut Supreme Court appointed racially and ethnically diverse members to serve on the State of Connecticut Judicial Branch Task Force on Minority Fairness (the "Connecticut Task Force").⁵⁶ The Chief Justice selected twenty-eight members, including a Justice of the Connecticut Supreme Court, judges, a state's attorney, other attorneys, academics, legislators, a police representative and representatives from community-based programs.⁵⁷

Once appointed, the Connecticut Task Force's first objective was to determine the scope of research by selecting those parts of the judicial process most likely to exhibit race and ethnic bias. The members of the Connecticut Task Force began by reviewing task force reports published by other states and other state studies to identify likely problem areas.⁵⁸ The Connecticut Task Force then divided into seven subcommittees to address each identified area of importance.⁵⁹

The Connecticut Task Force held four public hearings where forty-five speakers, including four city mayors, presented information. Other participants included the "NAACP, Urban League, ACLU/[Connecticut Civil Liberties Union], Community Justice Coalition, [Connecticut Council Against Domestic Violence], La Casa de Puerto Rico, Chief State's Attorney's office, Public Defender's office, Attorney General, [Connecticut Alcohol and Drug Abuse Council], and public officials from the municipalities and representatives of academia including law schools, local bar associations, and the clergy."⁶⁰ In addition, twenty individuals who "held a unique position in the legal system, or who had a depth of experience that made their perspective important" were selected for in-depth individual interviews.⁶¹ The Connecticut Task Force organized focus group discussions of four to eight people to discuss their experiences with the Connecticut judicial system and to identify those parts of the judicial process that seemed biased. Finally, the Connecticut Task Force developed questionnaire surveys for judges, attorneys and court employees to identify attitudes regarding certain substantive subjects and personal experiences of race and ethnic bias.⁶² After four years of study, the Connecticut Task Force submitted its final report to the high court identifying problem areas in the judicial system and recommending solutions to prevent further race or gender bias.

Although the Indiana Supreme Court has not initiated any statewide gender and race bias investigations to date, some statewide efforts on the subject of gender have occurred. The Indiana State Bar Association created a Commission on Women in the Profession to examine the existence of gender bias in the profession and to make recommendations to correct any problems found. Indiana

56. See CONN. MINORITY FAIRNESS REPORT, *supra* note 14, at 1.

57. See *id.*

58. See *id.*

59. See *id.* at 2.

60. *Id.* at 3.

61. *Id.* at 4.

62. See *id.*

Court of Appeals Judge Betty Barteau⁶³ has examined the history of women in the Indiana judiciary.⁶⁴ Both of these efforts underscore that Indiana is not exempt from the gender biases found in other states. The following is a general sketch of the findings of the Indiana State Bar Association and Judge Barteau.

In 1988, the Indiana State Bar Association formed the Indiana Commission on Women in the Profession (the "Commission") to:

- (1) assess the current status of women in the legal profession and to identify the career paths of women lawyers and their goals with respect to practice in the organized Bar;
- (2) identify barriers that prevent women lawyers from full participation in the work, the responsibilities and the rewards of the profession;
- (3) develop a program of education to address discrimination against women in the justice system and the unique problems encountered by women lawyers in pursuing their professional careers;
- (4) make recommendations to the Indiana State Bar Association for action to address problems the Commission identifies.⁶⁵

After conducting a survey from a sample of Indiana bar members, the Commission concluded that "gender bias, both overt and subtle, exists which limits women's participation and advancement in the legal profession in Indiana."⁶⁶ Moreover, the Commission concluded that its findings were consistent with the findings of the ABA's Commission on Women in the Profession report and the reports of other state bar associations.⁶⁷ As a result of its findings, the Commission recommended that the Indiana State Bar Association petition the Indiana Supreme Court to adopt a Rule of Professional Conduct "that would create a duty for all attorneys not to manifest gender bias in any professional setting."⁶⁸ The Commission also recommended that the Bar Association petition the Indiana Supreme Court to amend the Code of Judicial Conduct to reflect this position.⁶⁹ As a third recommendation, the Commission

63. Judge Betty Barteau served on the Indiana Court of Appeals from 1991 to 1997. After retiring from the bench, Judge Barteau secured sponsorship from the National Judicial College and a grant from the State Department to serve as Chief of Mission in Russia. She is charged with assisting the Russian judiciary in establishing judicial educational programs, facilitating the judicial appointments process and creating a judicial disciplinary mechanism.

64. The Honorable Betty Barteau, *Thirty Years of the Journey of Indiana's Women Judges 1964-1994*, 30 IND. L. REV. 43 (1997).

65. INDIANA STATE BAR ASS'N, REPORT OF THE COMMISSION ON WOMEN IN THE PROFESSION 2 (1991).

66. *Id.*

67. *Id.* at 2-3.

68. *Id.* at 5.

69. *Id.* at 6.

suggested that the Bar Association and the Indiana Judicial Conference combine forces to create a permanent joint committee of the bench and bar to implement these and other recommendations put forth by the Commission.⁷⁰

In 1993, the Indiana Supreme Court amended the Code of Judicial Conduct to prohibit biased conduct or the appearance of bias. The court added Canon 2C of the Code of Judicial Conduct that reads: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."⁷¹ The court also amended Canon 3, which states in relevant part:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, personal characteristics or status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.⁷²

The court amended the Code following the Commission's report. As of early 1999, the Indiana Rules of Professional Conduct have not been amended to reflect a similar admonishment.

Pursuant to the Commission's recommendations, the Indiana State Bar Association and the Indiana Judicial Center created a joint committee to implement the Commission's suggestions.⁷³ However, this joint committee was dissolved in 1995, with a request that the Indiana Judicial Center form a separate committee to continue the work.⁷⁴ No Judicial Center Committee was formed thereafter. The Indiana State Bar Association does maintain a Women in the Law Committee, which has continued to pursue the Commission's recommendations. For example, the Women in the Law Committee offers educational programs at each state bar association meeting, reports the number and percentage of women in leadership roles to the House of Delegates each year, develops sexual harassment and alternative work arrangement policies, and reviews the character and fitness interview standards for admission to the profession.⁷⁵ While these efforts are invaluable, a state-wide investigation of the

70. *Id.*

71. IND. CODE OF JUD. CONDUCT Canon 2C.

72. IND. CODE OF JUD. CONDUCT Canons 3B(5)-(6).

73. See Telephone Interview with Indiana Court of Appeals Judge Patricia A. Riley, Member, The Joint Committee (May 3, 1999).

74. See *id.*

75. See WOMEN IN THE LAW COMM., INDIANA STATE BAR ASS'N, REPORT TO THE ISBA HOUSE OF DELEGATES (1996) (copy on file with the *Indiana Law Review*).

entire judicial system followed by the implementation of sound bias-eradicating practices and policies must occur to achieve the broader goal of a judicial system free of bias.

Judge Barteau's 1997 article, *Thirty Years of the Journey of Indiana's Women Judges*,⁷⁶ provides another look into the status of women in the profession. Barteau chronicles the history of women serving in the judiciary and the obstacles women faced along the way. In 1869, Arabelle A. Mansfield of Iowa was the first woman admitted to the practice of law.⁷⁷ The Indiana Supreme Court first admitted women to the practice of law in 1893⁷⁸ though other Indiana courts admitted women to practice in all state courts as early as 1875.⁷⁹ Although not the first state to admit women to the legal profession, Indiana ranked eighth behind Illinois, Missouri, Michigan, Maine, Utah, Ohio, and Wisconsin.⁸⁰ As Judge Barteau points out in her article, while Indiana may have been one of the pioneer states to admit women to the practice of law, the state has been much less motivated to cultivate women to serve in the judiciary.⁸¹ Indiana's history plainly illustrates this point. V. Sue Shields was the first female judge in Indiana in 1964,⁸² some ninety years after women were admitted to Indiana practice.⁸³ In 1975, more than ten years later, Betty Barteau was the next woman elected to the Indiana judiciary.⁸⁴ Both Shields and Barteau served as superior court judges in different counties.⁸⁵ After Shields' term as a superior court judge, she was appointed and served as the first female judge on the Indiana Court of Appeals in 1978.⁸⁶ Z. Mae Jimison entered the judiciary as the first female African American to serve as judge in 1988.⁸⁷

As of 1994, women comprised only 12.3% of the Indiana judiciary.⁸⁸ While the percentage of female attorneys in 1994 is unknown, in 1991, 16.4% of the attorneys were women.⁸⁹ Indiana's history clearly demonstrates that the number

76. Barteau, *supra* note 64.

77. *See id.*

78. *See id.* at 55. In Indiana, Antoinette Dakin Leach was the first woman admitted to the bar by order of the supreme court. *See id.*

79. *See id.* at 55-56, 62.

80. *See id.* at 62. The District of Columbia also admitted women to practice to law prior to Indiana. *See id.*

81. *See id.* at 65.

82. *See id.*

83. *See id.*

84. *See id.* at 66.

85. *See id.*

86. *See id.*

87. *See id.* at 67. Phyllis Senegal, who is African American, was appointed as Judge Pro Tempore in 1975 and 1976. *See id.* at 67-68. Justice Myra C. Selby shattered two glass ceilings when she became the first female African American to serve on the Indiana Supreme Court in 1995, about 120 years after women began to practice law. *See id.* at 69.

88. *Id.*

89. *See id.* The Indiana Supreme Court Clerk's Roll of Attorneys currently is being updated

of women serving as judges is simply not keeping pace with the number of female attorneys entering the profession. Judge Barteau attributed women's noticeably slow entry into the judiciary to a combination of factors including the prohibition or discouragement of women's enrollment in law schools, the deterrence of women pursuing careers as litigation attorneys (typically among the best judicial candidates), and the view that women lacked sufficient political credentials to be viable candidates.⁹⁰ Undoubtedly, these and other factors play a role in the underrepresentation of women in the judiciary.

While the Commission's findings and Judge Barteau's work shed some light on the status of women in our state's judicial system, no similar effort has focused on the status of Indiana minorities as lawyers or judges. There is no doubt, however, that issues of race bias are equally as compelling and deserving of critical scrutiny. The paucity of data regarding race and gender bias in the State of Indiana underscores the need for careful investigation and study.

CONCLUSION

We must decide whether we will leave for the next generation a legacy of indifference or opportunity. Remaining indifferent toward problems of race and gender bias is the comfortable path; yet walking the comfortable path may trample on individual rights and lead to diminished public confidence in the judicial system. Now is the time for Indiana to seize the opportunity to embrace self examination and embark upon the hard work of creating a judicial system that promotes the goal of fairness.

to reflect the gender of each registered attorney. It will not, however, reflect the attorney's race.

90. See *id.* at 70-73.

APPENDIX*

STATES

GENDER TASK FORCE

RACE TASK FORCE

Alabama	None	None
Alaska	1993 - teamed with federal judiciary	1995
Arizona	None	None
Arkansas	None	None
California	1986 - Special Committee of Judicial Council members 1987 - Advisory Committee	1991
Colorado	1988	1996
Connecticut	1990	1994
Delaware	1993 - teamed with state bar	1995 - teamed with state bar
District of Columbia	1990	1990
Florida	1988	1989
Georgia	1989	1993
Hawaii	1987	1987
Idaho	1994	1994
Illinois	None	None
Indiana	None	None
Iowa	1990	1990
Kansas	None	None
Kentucky	1989	1997
Louisiana	1989	1993
Maine	1993	None
Maryland	1986 - teamed with state bar	None

Massachusetts	1987 - originally teamed with state bar	1990 - today, Massachusetts does not employ a race/ethnic bias commission
Michigan	1987	1987
Minnesota	1987	1989
Mississippi	1998	None
Missouri	1990	None
Montana	1990	None
Nebraska	1991	Currently establishing a race/ethnic bias task force
Nevada	1987	None
New Hampshire	None	None
New Jersey	1982	1984
New Mexico	None	1997
New York	1984	1988
North Carolina	None	None
North Dakota	1987	None
Oklahoma	None	None
Ohio	1991 - teamed with state bar	1993
Oregon	1995 - teamed with state bar	1992
Pennsylvania	1994 - teamed with state bar	None
Rhode Island	1984	None - but employs a task force for limited English-speaking litigants

South Carolina	1992 or 1993 - the task force was unable to complete its charge	None
South Dakota	1995	1995
Tennessee	1994	1994
Texas	1991	None
Utah	1986	1996
Vermont	1988	1995
Virginia	None	None
Washington	1987	1987
West Virginia	1993	None - The Commission of the Future of the West Virginia Judiciary tangentially addresses race and ethnic issues
Wisconsin	1989 - created by state bar and approved by supreme court	None
Wyoming	None	None

*The author obtained the preceding information by calling all 50 states in January and February 1999 to ascertain whether or not the state's highest court had created a gender or race task force. This inquiry was designed to identify high court efforts to eradicate bias in the courts and therefore does reflect the efforts of task forces or commissions established through bar associations and other entities. Also, because this Article focuses on the movement to form race and gender bias task forces in this country, the Appendix reflects the date of the task force formation only. Many of these task forces continue to thrive in their efforts to eradicate race and gender bias in the courts, however, a few have encountered difficulties related to funding, lack of interest or other obstacles. It was beyond the scope of this Article to trace the history of each task force from its inception until the present.

PROTECTING THE HAND THAT ROCKS THE CRADLE: ENSURING THE DELIVERY OF WORK RELATED BENEFITS TO CHILD CARE WORKERS

DEBRA COHEN-WHELAN*

INTRODUCTION

Illegal child care has taken a center stage as the nanny tax trap has snared politicians,¹ political appointees,² and candidates for political office.³ Media attention given to the nanny tax scandals raised public awareness and stimulated debate on issues ranging from finding qualified in-home child care providers and

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1. White House lawyer William Kennedy was stripped of his duties overseeing background checks of administrative employees after it was discovered that he attempted to conceal the fact that he had not paid taxes for a nanny employed by his family. See Douglas Jehl, *White House Aid Who Failed to Pay a Tax Is Punished*, N.Y. TIMES, Mar. 21, 1998, at 1.

2. Zoe Baird and Kimba Woods both withdrew their nominations for attorney general after allegations surfaced that they had hired illegal domestic workers. The focus on non-critical issues such as Nannygate has disqualified excellent candidates such as Baird and Woods, depriving the nation of their service. See STEPHEN CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994). Janet Reno, a single woman with no children, was later confirmed as the nation's first woman attorney general.

3. In California, the 1994 Michael Huffington-Diane Feinstein senatorial race was plagued with nanny tax allegations. First, it was discovered that Huffington had employed an illegal immigrant to work in his home as a housekeeper/nanny for more than four years. In an advertising campaign, Huffington accused Feinstein of also employing an illegal housekeeper. Feinstein countered that she had hired the woman long before enactment of the 1986 federal law that made it a crime to hire illegal workers, had checked the woman's visa to verify her employment status, and had paid all of the required employment taxes. Feinstein claimed that she was unaware that the woman's visa was valid for only one year and was conditional on her employment at the Guatemalan Consulate in San Francisco. The INS later verified Feinstein's story, stating that the employee did have a valid visa and that only an expert would be able to detect the employment limitations. While Feinstein's defense upheld public scrutiny Huffington did not fare as well. Days after a local television station poll showed Huffington with a two-point lead, another station released a poll showing Feinstein with a 16-point lead over Huffington, up 10 points from a poll taken two weeks earlier. The station attributed Huffington's drop in the polls to his disclosure about employing the illegal worker. See Patrick J. McDonnell et al., *Feinstein Worker Entered U.S. Legally, but Visa Lapsed Politics: INS Records Indicate No Violation of Federal Law*, L.A. TIMES, Nov. 5, 1994, at A1.

During the 1998 California gubernatorial primary race, allegations resurfaced that Representative Jane Harman broke the law by hiring an illegal nanny. The allegations first became public when Harman voluntarily disclosed the information in defense of Zoe Baird and Kimba Woods. Harman lost the primary to challenger Grey Davis, who was later elected Governor of California. *Nanny Allegations Resurface*, CONGRESS DAILY, Apr. 27, 1998.

the child care demands of women in the work force, to the archaic and confusing legal requirements associated with the payment of employment taxes for household employees.⁴ Child care issues also received unprecedented attention in the political dialogue.⁵ Congressional consideration of the nanny tax compliance problem prompted legislative simplification of the employment tax reporting requirements for household employees.⁶

The payment of employment taxes by household employers is only half of the issue. The political rhetoric has ignored the effects of noncompliance on household employees. Some laborers have jobs paying less than the minimum wage, and they receive no overtime or health care benefits. These workers, who are predominantly women, will be unable to receive social security benefits upon retirement, unemployment benefits if they are suddenly discharged, or disability benefits in case of illness or accident.

Many in-home child care providers endure third-world working conditions. The images of illegal immigrant workers, who toil in the soil, digging and picking the fruits of our agricultural labor, or work fourteen-hour days in sweatshops⁷ for little money and no benefits, spawn protests and boycotts.⁸ However, little consideration is given to the plight of workers, both legal and illegal, who iron clothes, scrub floors, and change diapers every day in numerous American homes. These workers provide services subordinate to other wage laborers with respect to status, salary, and opportunities for advancement. Their average yearly income barely exceeds the poverty line. And they are virtually all women.

In our own employment relationships we may be in a position to bargain for decent wages, medical benefits, educational assistance,⁹ and other accouterments

4. See Rochelle L. Stanfield, *Child Care Quagmire*, NAT'L L.J., Feb. 27, 1993, at 512 (quoting Mary Whitebrook, Director of the Oakland-based Child Care Development Project, who commented that the scandal is helping to break the silence about the child care problem and raise the awareness of the public, policy-makers, and the media).

5. Senator Daniel Patrick Moynihan (D-NY) introduced a bill to reform the employment tax requirements. A similar bill was introduced in the House of Representatives by Andrew Jacobs, Jr. (D-IN).

6. Social Security Domestic Employment Reform Act of 1994, P.L. 103-387, 108 Stat. 4071 (1994). See *infra* notes 26-41 and accompanying text for a discussion of this act.

7. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2181 (1994) (citing U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-88-130BR, "SWEATSHOPS" IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS 16 (1988). A sweatshop is defined as "a business that regularly violates both wage or child labor laws and safety or health regulations.").

8. Activists targeted Nike and Disney with protests and boycotts following reports from the National Labor Committee that workers producing Nike shoes in Indonesia earn as little as two dollars per day and make as many as 100 shoes a day. Many of the workers are children, some as young as ten years old, and work up to 18 hours a day. See Diana Griego Erwin, *Children's Labor Cheapens Our Gifts*, SACRAMENTO BEE, Nov. 26, 1996, at B1.

9. IRC § 129 authorizes the establishment of employer educational assistance programs.

that middle class workers expect to receive in exchange for their labor. For a fortunate few, child care is part of the compensation package.¹⁰ When both parents work outside of the home, employer-provided child care is the ultimate perquisite.¹¹ Other hard working American families are faced with a dilemma: Who will mind the kids? Immediate and extended family members may not be available or reliable.¹² As the average work day increases, the eleven-hour daily schedule of most day care facilities may not provide adequate child care coverage. Reliable in-home child care is the only alternative for some working families.

As the cost of in-home child care increases, even families that can "afford" in-home child care struggle to pay the exorbitant salaries demanded by experienced nannies.¹³ Many nannies, however, will accept a lower fee on the condition that they are paid under the table to increase the amount of money they actually take home. Hiring an illegal immigrant child care provider presents another more affordable in-home child care option.¹⁴ Illegal immigrant child care providers are paid lower wages and will often work longer hours than their legal counterparts.¹⁵ In either case there is a great incentive to avoid federal laws that

Employees participating in an employer educational program may receive tax-free payments of tuition, books, and supplies worth up to \$5250. I.R.C. § 129 (West Supp. 1998). For further discussion of this section, see *infra* notes 130-35 and accompanying text.

10. See generally Christine A. Clark, *Review of Florida Legislation; Comment: Corporate Employee Child Care: Encouraging Business to Respond to a Crisis*, 15 FLA. ST. U. L. REV. 839 (1987). Professor Clark notes that employers have been slow in responding to the changing demographics of the work force and have failed to provide most working families with child care options. *Id.*

11. Day care has become a major workplace issue for working mothers. Only two percent of American employers provide their workers with day care. Employers providing day care tend to be large companies such as Motorola and Eli Lilly. See Kim Phillips, *The Parent Trap in These Times*, INST. FOR PUB. AFF., Feb. 1997.

12. See *id.* Many women are forced to rely on relatives for day care when no other options are affordable or available. However, friends and family members are notoriously unreliable. Even if keeping child care in the family provides the best environment for the child, many adult family members are working as well.

13. See *infra* notes 90-91 and accompanying text for a discussion of wages paid to experienced, educated nannies.

14. Throughout this Article, use of the term "illegal immigrant child care worker" is distinguished from "illegal child care worker." The author intends illegal immigrant child care worker to mean someone who is ineligible to work in the United States. Based on this definition, legal workers include workers with documentation of United States citizenship, lawful residence, or INS work authorization. When referring to an illegal child care worker, the author intends to include any worker who is a citizen, resident, or other individual who is authorized to work in the United States, but who fails to comply with federal and state employment tax laws or to report earned income.

15. See Kathleen A. Delaney, Note, *A Response to "Nannygate:" Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers*, 70 IND. L.J.

require household employers to hire legal household workers and pay employment taxes.

The delivery of child care services results from the formation of a partnership between parents, private child care providers, and the public.¹⁶ The federal tax laws reign as the key element of the public paradigm.¹⁷ The provisions that command the payment of employment taxes are found in the Internal Revenue Code (the "IRC"),¹⁸ as is the child care tax credit,¹⁹ which provides a federal tax rebate for child care expenses. The child care credit is in fact the largest federal child care subsidy available to taxpayers with dependent children.²⁰

Reliance on limited tax credits to subsidize the cost of child care is symptomatic of a federal tax policy that provides rebates to taxpaying families but fails to consider the interests of child care providers. Federal child care tax expenditures, such as the child care credit, can be utilized to elevate the status of domestic work, allowing child care providers to achieve economic parity with other laborers. Advancements in the working conditions associated with in-home child care work will make domestic employment a more attractive employment option for women, particularly women who are re-entering the workforce after raising children of their own.

The failure to require household employers to establish legal employment relationships with child care providers devalues domestic work and produces adverse economic consequences that extend beyond the exploitation of any individual worker. Child care workers who do not receive wages and benefits necessary for their basic subsistence must rely on other sources of financial assistance. Ultimately the cost of supporting domestic workers and their families shifts to the public through government programs such as Medicaid, Aid to Families with Dependent Children ("AFDC"), and food stamps. The importance of these issues justifies the establishment of a federal tax policy that protects the interests of household employees and their families by shifting the economic burden of providing for these workers to the employers for whom they work. However, the tax code and its enforcers have done little to encourage household employers to pay employment taxes for their household employees.

The purpose of this Article is to explore why compliance with the federal domestic employment tax laws has decreased despite simplification of the

305, 314 (1994) (quoting Ellen Sehgal & Joyce Vialet, *Documenting the Undocumented: Data, Like Aliens, are Elusive*, MONTHLY LAB. REV., Oct. 1990 at 18, 20).

16. See Sharon C. Nantell, *The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Public/Parental Alliance*, 80 MARQ. L. REV. 883 (1997). The author refers to the delivery of child care services to parents through private child care providers with federal subsidies. *Id.* at 907-09.

17. See *id.* at 909.

18. I.R.C. §§ 3101 (1994), 3102 (West Supp. 1998).

19. I.R.C. § 21 (West Supp. 1998). See *infra* notes 149-55 and accompanying text for a discussion of the child care credit requirements.

20. See Stanfield, *supra* note 4, at 512. It is estimated that 60% of the \$7 billion in federal child care subsidies paid in 1991 were paid through the child and dependent tax credit.

requirements for paying the tax.²¹ This Article examines noncompliance with the nanny tax by household employers and suggest proposals for change. The issues raised in this Article apply with equal force to all domestic employees who are denied the benefits afforded other paid laborers, not just nannies. However, establishing a policy to protect the rights of in-home child care providers is the specific focus of this Article because there are current tax provisions that grant tax incentives for child care expenditures.

The Article begins by providing background information on the nanny tax and its payment. In Part III, the Article considers non-compliance by household employers. This section suggests several reasons for tax avoidance by domestic employers, including: the expense and administrative burdens associated with paying employment taxes; the proliferation of illegal child care providers and their effect on compliance with employment tax provisions; the tendency to dissociate domestic work from other professions where labor is performed outside of private homes; and the under-enforcement of the nanny tax provisions.

Part IV of the Article addresses the long-term costs to both the employers and employees who fail to follow the law. Part V considers the role of the child care credit and the disallowance of a deduction for in-home child care in discouraging employers to pay employment taxes for their household workers. This Article suggests that household employer compliance will increase if household employers and their employees are informed of the benefits associated with legal employment, threatened with sufficient punitive measures to deter under reporting, and given tax incentives that mitigate the expense of paying the nanny taxes.

I. PAYMENT OF THE NANNY TAX

There are federal and state tax implications associated with hiring a household employee. Domestic employers are required to pay social security and Medicare ("FICA") taxes and federal unemployment ("FUTA") tax.²² Collectively these federal taxes have been referred to by the media as "Nanny Taxes." The nanny tax burden is divided equally between the household employer and employee.²³ In addition to the required employment taxes (FICA

21. See *infra* notes 31-37 and accompanying text for a discussion of the simplification of the employment tax payment procedures.

22. The employer and employee must each pay FICA and FUTA taxes. The social security tax is 6.2% up to a wage ceiling that is adjusted annually for inflation (\$61,200 for 1995 and \$62,700 for 1996, 1997, and 1998). The Medicare tax is 1.45% and has no wage ceiling. The total nanny tax is 15.3% of the employee's cash wages. See I.R.C. §§ 3101(a) & (b), 3111(a) & (b) (1994).

23. See Efrem Z. Fisher, *Child Care: The Forgotten Tax Deduction*, 3 CARDOZO WOMEN'S L.J. 113, 117 (1996). The employer may choose to pay the employee's portion of the social security and Medicare taxes instead of withholding the taxes from the employee's cash compensation. When the employment taxes are paid by the employer, the taxes are not included as wages subject to further employment tax. However, payment of the employee's employment tax

and FUTA), the employer may agree to voluntary federal income tax withholding.²⁴ Domestic employers may also make advanced earned income payments to qualifying employees.²⁵

Four years ago Congress simplified the procedure for reporting wages paid to domestic employees, including nannies, by enacting the Social Security Domestic Employment Reform Act (the "Reform Act") of 1994.²⁶ The Reform Act permits domestic employers to annually pay and report employment taxes on their own Form 1040, Schedule H.²⁷ The Reform Act provides that employment taxes (FICA and FUTA) must be paid by individuals who employ domestic workers, such as nannies, whom they pay \$1000 or more in any taxable year.²⁸ Domestic service provided by certain family members and any individual under the age of eighteen whose principal occupation is not domestic service are exempt from the nanny tax requirements.²⁹

Under prior law, household employers were required to file quarterly statements, end-of-the-year wage and tax statements, and end-of-the-year transmittal of income and tax statements.³⁰ The Reform Act made three

liabilities requires inclusion of the amount in the employee's gross income. The employee may ultimately bear the burden of the entire tax if the employers contribution is taken out in the form of lower salary. *See id.*

24. The IRC exempts household employers from the withholding requirements. Remuneration paid for household services performed by an employee in the home of the employer is not subject to withholding. I.R.C. § 3401. Income tax withholding is not required from wages paid for domestic services performed in private homes and clubs provided it is not used primarily to supply board or lodging as a residence. *See A Guide to the Nanny Tax*, Fed. Tax Coordinator (RIA), ¶¶ 109, 111. Household services include services performed by cooks, maids, governesses, and babysitters. *See* Treas. Reg. § 31.3401(a)(3)-1(a)(1) (1998). An employer, however, may voluntarily agree to withhold federal income taxes for the nanny's wages. *See id.*

25. *See* I.R.S. Notice 89-95, 1989-2 C.B. 417. If the employer withholds income tax, the employer must give the employee notice as to the earned income credit. If the employee provides the employer with an Earned Income Credit Advances Payment Certificate, then the employer must make the advanced earned income credit payment to the employee as requested. The payments are made out of the employment taxes paid by the employer. *See id.*

26. P.L. 103-387, 108 Stat. 4071 (1994).

27. I.R.C. § 3510(a) (1994).

28. The threshold amount was \$1100 in 1998. *See* I.R.C. § 3121(x) (West Supp. 1998).

29. *See* I.R.C. § 3121(b)(21) (1994).

30. IRC § 3510 provided that returns with respect to domestic service be filed on or before the 15th day of the fourth month. I.R.C. § 3510. Thus, employment taxes, social security taxes, and Medicare taxes were paid every quarter. Federal unemployment taxes were paid annually, but individual states may require more frequent payments. A Form W-2 must be given to the employee reporting wages paid during the last year. A copy is then sent to the Social Security Administration. An Employer's Quarterly Tax Return for Household Employees (IRS Form 942) must also be filed every quarter. *See* Dan Moreau, *Got Household Help? Get This Right: If You Pay for Child Care or Housework, Chances are Good You Owe the IRS a Form 942*, KIPLINGER'S PERS. FIN. MAG., Jan. 1994.

fundamental changes to simplify the payment of employment taxes and significantly reduce the administrative requirements associated with the payment of the tax.³¹ First, it eliminated the quarterly reporting requirements.³² Second, it increased the threshold amount from \$50 to \$1000.³³ Third, it exempted wages paid to certain family members and weekend baby sitters.³⁴

The purpose of the law was to establish new enforcement mechanisms and to improve employer compliance to ensure that domestic workers receive the social security and unemployment coverage to which they are entitled.³⁵ Congress was hopeful that the new law would increase the number of employers paying the tax by providing a simplified payment procedure and having taxpayers sign under penalty of perjury that the household employer owed no taxes for the year.³⁶ While taxpayer response to the new rules was immediate, it was not what Congress had anticipated. The simplification of the nanny tax reporting requirements has had an adverse effect on nanny tax compliance.³⁷

The numbers are alarming. In 1994, the number of household employers filing employment tax returns was 500,000.³⁸ In 1995, the first year the new law was in effect the number fell to 300,000.³⁹ In 1996, the numbers remained approximately the same and were not expected to increase in 1997.⁴⁰ In the end, the legislative effort to protect the interests of domestic employees resulted in the number of domestic employers paying the nanny tax plummeting by almost forty percent.⁴¹

II. REASONS FOR NONCOMPLIANCE

Household employers evade the payment of employment taxes for a variety of reasons. The ease with which household employers break the law by not paying employment taxes may not reflect complete disdain for the tax itself, but may be an indictment on the system that commands its payment.

31. See H.R. REP. No. 103-491, at 3266 (1994).

32. This change was implemented with the addition of Line 52 to the individual income tax return asking for the amount of Social Security and Medicare taxes owed for household workers.

33. P.L. 103-387, § 2, 108 Stat. 4071 (1994).

34. *Id.*

35. See H.R. REP. No. 103-491, at 3266.

36. Under the new law, nanny taxes are reported on Line 52 of Income Tax Form 1040. This form is signed under penalty of perjury. Taxpayers who fail to pay nanny taxes are lying to the government.

37. See *IRS Finds More People Are Skipping Nanny Tax Simplified Rules Bring Increase in Cheating*, CHI. TRIB., Apr. 5, 1998, at 15. The *Chicago Tribune* reports that based on estimates as many as four million people owe nanny taxes, but fewer than one in 13 are complying with the law. *Id.*

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*

Succumbing to the temptation to cheat on your taxes is almost inevitable when no one else is paying the tax. Extreme noncompliance trivializes the law to the point that breaking it seems prudent rather than immoral. The politicization of the nanny tax issue has not helped, as taxpayers perceive the media debate over the payment of nanny taxes to mean that only those with political aspirations need obey the law.⁴² In fact, many household employers may not recognize the establishment of an employee/employer relationship with their household worker.⁴³ For most of us, the term "nanny tax" is associated with women like Mary Poppins or Alice on the Brady Bunch, instead of Jane Neighbor from the apartment next door who comes over every afternoon to watch the kids.

Many taxpayers view the Internal Revenue Service ("IRS") as the enemy, and are distrustful of any attempt to collect taxes owed, even if properly assessed, making even otherwise honest people more comfortable with evading taxes owed.⁴⁴ Part of the problem is that as with other taxes, the economic burdens associated with paying the nanny tax are relatively large in relationship to the perceived benefits.⁴⁵ It is the child care provider who is the direct recipient of the benefits associated with the payment of the nanny tax.⁴⁶ However, the child care provider is a potential taxpayer, also motivated by tax avoidance. Therefore, many child care providers may be willing to forgo the long-term benefits of reporting their income in order to satisfy short-term financial needs. Because the

42. See *id.* As one working mother puts it, "My accountant told me I have to stop this and issue paycheck stubs and report what I pay to the IRS But since no president is ever going to nominate me for the Cabinet, what do I care about paying this stupid nanny tax? And if I get caught, I'll just pay the fine and go on doing what I am doing." *Id.* This mother's extreme focus on her own self interest and complete disregard for the long-term economic security of her nanny typifies the plantation mentality that pervades domestic employment.

43. The nanny tax is triggered in any year in which the household worker is paid in excess of \$1000. See I.R.C. § 3121(a)(7) (West Supp. 1998).

44. See Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy and How We Can Make Them Sane*, 16 VA. TAX. REV. 155, 157 n.2 (1997); see also *id.* at 174 n.45. In support of this position, Professor Rosenberg gives the following example:

When law school tax classes discuss the fact that a taxpayer who finds \$100 is subject to tax on that treasure trove, students . . . ask "why would anyone report it anyway?" If a student replies "it's the law," her answer is more often than not met with derisive laughter; yet those same students who laugh at the idea of paying \$31 in tax (assuming a 31% marginal tax rate) . . . would not steal \$31 from a classmate even if they were assured they would not be caught

Id.

45. See *id.* at 171-72. The problem with taxes is the association between the payment of taxes and frustration and sacrifice. The separation of tax benefits and government services from burdens create the impression that the taxes are punishments. See *id.*

46. See *id.* at 179. Professor Rosenberg suggests that the reason taxpayers do not realize what they are paying for with their tax dollars is that the person who actually pays the tax enjoys no more benefits than the person with equal assets who evades the tax. *Id.*

employer and the employee both perceive the benefits of establishing a legal employment relationship as minimal in comparison to the immediate economic burdens, incentives must be provided to encourage compliance.

A. Paying the Price

Many household employers fail to pay their nanny taxes because it is too expensive. The cost of employing an in-home child care provider exceeds the cost of other types of child care, such as day care facilities, or group care in private homes.⁴⁷ Most families find that paying the child care is a financial strain. After mortgage and rental expenses, child care represents the largest item on many family's budget.⁴⁸

Paying employment taxes increases the cost of child care substantially. Based on one estimate the average salary of a full time nanny is approximately \$280 per week, or \$14,500 for the year.⁴⁹ Social security and FICA on this amount are \$2218 per year.⁵⁰ Because of the prevalence of illegal employment, many nannies may be unwilling or unable to pay their share of the employment taxes leaving the employer paying the entire amount. In addition the employer must pay FUTA and state taxes for disability and unemployment insurance. In the end, compliance with the employment tax laws amounts to approximately \$2500.⁵¹

B. Red Tape

The complications associated with paying household employment taxes provides an additional reason for noncompliance by household employers. Under current law, federal employment taxes are reported, and paid, annually on the employer's Form 1040.⁵² However, payment of employment taxes at the end of the year requires detailed record keeping throughout the year. The employee must be given a Form W-2 for income tax purposes, a copy of which must be sent to the Social Security Administration. To accurately report income on Form W-2, the household employer must account for all cash wages paid to the employee for the year. To complete Form W-2, the employer is required to follow complex instructions and perform mathematical calculations that many taxpayers find intimidating.

In addition to the federal income tax laws, the employer must also comply with state income and employment tax laws. Unlike the federal employment tax procedures, many states impose quarterly filing requirements on household employers.⁵³ In addition to the federal and state reporting requirements, the

47. See *infra* notes 96-97 and accompanying text.

48. Nantell, *supra* note 16, at 884.

49. See *A NaniNet* (visited Oct. 7, 1998) <<http://www.4nannytaxes.com/tips.htm>>.

50. The social security tax on this amount is 6.29%. The Medicare tax is 1.45%. See *id.*

51. See *id.*

52. See *supra* note 27 and accompanying text.

53. In California, for example, domestic employers must register with the Employment

Immigration and Naturalization Service ("INS") also imposes obligations on household employers. The immigration status of a new employee must be verified.⁵⁴ Once the employer verifies the worker's eligibility to work in the United States, Form I-9 must be completed and maintained in the employer's records.⁵⁵

Passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Reconciliation Act")⁵⁶ increased the burden on employers of household employees. Under the Reconciliation Act, all employers are required to report information on newly hired employees.⁵⁷ The purpose of the act is to track the employment of non-custodial parents for purposes of collecting child support.⁵⁸ All employers must comply with the federal requirements regardless of the size or type of business. The Reconciliation Act requires a household employer to report the nanny's name, address, social security number, date of hire and date of birth. Certain employer information, such as name and address must be provided as well.⁵⁹

C. Illegal Immigrant Workers

The proliferation of the immigrant workforce has spawned a ground swell of willing illegal immigrant child care providers. In certain areas of the country, hiring an illegal immigrant child care provider is commonplace. Illegal immigrant nannies are often referred to potential employers by legitimate employment agencies when they do not have enough legal applicants to meet employer demand.⁶⁰ In major metropolitan areas, household employers lament that the only domestic workers who are willing to work long hours for a reasonable price are illegal immigrants.⁶¹

Once an illegal immigrant worker is hired, there is little chance that the

Development Department ("EDD") within 15 days after paying cash wages of \$750 or more in a calendar quarter, and must hold and transmit to the EDD the employee's portion of the tax for state disability. Household employers who pay cash wages of \$1000 or more in a calendar quarter must also pay the employer's portion of the unemployment insurance. *See* RUSSELL S. BICK, 1999 GUIDE TO CALIFORNIA TAXES 627-30 (1999).

54. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at scattered sections of 8 U.S.C.).

55. *See* 8 C.F.R. 274(a) (1994).

56. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at scattered sections of 8 U.S.C. & 42 U.S.C.).

57. 42 U.S.C. § 653a(b) (Supp. II 1996).

58. *See id.* § 653(a).

59. *See id.* § 653a(b). Employers must provide this information to the State Directory of New Hires. *See id.*

60. *See* Deborah Sontag, *Increasing Two-Career Family Means Illegal Immigrant Help*, N.Y. TIMES, Jan. 24, 1993, at 1.

61. *See id.* Zoe Baird claimed that whenever she advertised for domestic service positions, only illegal applicants responded. *See id.*

employer will pay the nanny tax. First, an employer who broke the law by hiring an illegal immigrant is unlikely to comply with employment tax laws. Second, the secrecy of the illegal employer/employee relationship precludes any government interaction for fear of the worker's detection and deportation. Third, completion of the IRS employment tax forms requires the employer to report the employee's social security number.⁶² Without a legitimate social security number, the employer is unable to pay employment taxes.

D. Women's Work

The status given to home labor is inferior to the status given to other types of wage labor in terms of financial status, security and recognition.⁶³ Despite advances of women in the paid labor force, child care and housework are perceived as marital obligations that rest with women. Tasks performed by nanny's such as feeding babies and changing diapers have traditionally been performed for free by women residing in the home.⁶⁴

The delegation of child care to surrogate care takers continued the wage inequality between domestics and other paid laborers.⁶⁵ The earliest household workers were slaves and indentured servants, who cooked, cleaned, and cared for children without financial remuneration. The turn of the century brought immigrant women laborers who received below market wages for their services. Child care has never achieved the status associated with other types of paid labor in terms of earnings, status, and career advancement.⁶⁶

Domestic workers have failed to attain equal status under the law. The reporting requirement for wages paid to household workers is higher than that for

62. Department of the Treas., I.R.S. 1998 Form Schedule H.

63. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 14-15 (1996) (discussing the legal treatment of women's unpaid wages).

64. See Kathryn Branch, Note, *Are Women Worth As Much As Men? Employment Inequities, Gender Roles, And Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 121 n.7 (1994). Use of the term "working women" to denote women who work in the paid labor force versus in the home illustrates the devaluation of unpaid labor performed at home. The author notes that work is work and that women who work in the home work just as much as women who work outside—the fact that in-home workers are not financially compensated does not change the character of the labor performed. *Id.*

65. *Id.* at 138 n.70 (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 426 & tbl. 671 (113th ed. 1993) [hereinafter 1993 STATISTICAL ABSTRACT]). Professional child care is one of the lowest paying jobs in this country. See 1993 STATISTICAL ABSTRACT, at 426, tbl. 671. Truck drivers earn almost three times as much. See Branch, *supra* note 64, at 138 n.72.

66. Women who spend a substantial amount of time in the unpaid work force worry that their responsibilities as a homemaker will not translate into marketable skills that can be carried over into the paid labor force. This is equally true for women who perform domestic service in the paid labor force by providing household services to another family. See Silbaugh, *supra* note 63, at 73.

other workers, exempting more domestic workers from social security upon retirement.⁶⁷ The National Labor Relations Act ("NLRA")⁶⁸ excludes individuals employed as domestic workers in private homes.⁶⁹ This exclusion denies domestic workers the opportunity to organize under NLRA protections for increased wages or benefits.⁷⁰

Excluded from the Occupational Safety and Health Act ("OSHA")⁷¹ definition of employer is an individual who, in their own residence, privately employs a person to perform domestic tasks, such as caring for children.⁷² While it may be argued that domestic employers employing an individual household worker should not fall within the scope of the OSHA requirements, in other contexts the term employer is interpreted broadly enough to include an employer who only employs one employee. Most state worker's compensation statutes also fail to protect domestic workers.⁷³

It is debatable whether the inferior status given to domestic work is attributable to the value placed on the work performed, or the women workers providing the services. The two, however, cannot be separated as cultural devaluation of child care work relates both to the status given to housework and gender inequities in employment in general. Domestic work remains primarily women's work and women's work is notoriously under-paid.⁷⁴

Reliable in-home child care enables women to fulfill the demands of professional employment. Traditional gender roles envision the workaholic man consumed by his career while his wife stays home to cook, clean and raise children. Liberation from household chores and child care responsibilities allows women to compete with men free from the same domestic obligations.

In dual-income families, the solution to the division of household labor problems is often to hire another woman to perform these domestic functions for very low pay.⁷⁵ Thus, the advancements made by professional women through

67. The earnings threshold for social security coverage for household workers is \$1000 per year. *See* Social Security Domestic Employment Reform Act of 1994, Pub. L. No. 103-387, 108 Stat. 4071 (increasing the quarterly threshold of \$50 to an annual threshold of \$1000 exempting more domestic workers from coverage under the act).

68. 29 U.S.C. §§ 141-97 (1994 & West 1998).

69. *See id.* §§ 141-42(1) (West 1998).

70. *See id.*

71. *Id.* §§ 651-78 (1994 & Supp. II 1996).

72. *Id.* § 652 (1994). OSHA applies to employers who are "engaged in a business affecting commerce." *Id.*

73. *See* 4 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* (1995). Only New Hampshire applies worker's compensation statutes to all domestic workers. Twenty-three states apply worker's compensation statutes within certain limited restrictions. The remaining states do not apply worker's compensation statutes to domestic workers at all. *See id.*

74. *See* Awida R. Marquez, *Comparable Worth and the Maryland Era*, 47 MD. L. REV. 1129, 1150 (1988) (arguing that jobs are undervalued because women hold them).

75. *See* ROSANNA HERTZ, *MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES* 159 (1986).

the assignment of child care duties have been made at the expense of women without comparable professional skills or opportunities. When child care responsibilities are given to an in-home child care provider, the woman of the household typically functions as the house manager, dictating the hours and terms of employment to the household worker.⁷⁶ This means that improving the working conditions associated with child care is dependent on women protecting the rights of other women and recognizing the economic value of child rearing.

E. Crime and Punishment

The final, and most disturbing, reason for noncompliance is that many taxpayers do not fear detection or retribution. They just do not think that they will be caught. The tax system is based on taxpayer self-assessment, which is reinforced by the threat of detection and prosecution.⁷⁷ It has been suggested that absent these threats, taxpayers will cheat on their taxes when the opportunity is present.⁷⁸ It is undeniable that a taxpayer is more likely to pay a tax when it cannot be avoided, such as when the tax is withheld from the taxpaying employee's paycheck.⁷⁹ However, when a taxpayer is responsible for reporting items of income, many receipts are likely not reported at all.⁸⁰

The payment of employment taxes is entirely dependent on taxpayer self-assessment and reporting. The tax is not withheld from the employer's paycheck; therefore, the tax is paid only when the household employer takes affirmative steps to accurately report, assess, and pay the tax. Because the domestic employment relationship occurs in the privacy of the taxpayer's home, the government can never really know if the taxpayer is employing a household worker, absent intrusive home surveillance devices. Even when the household employer properly reports the employment relationship, the IRS must completely rely on taxpayer self-assessment for the proper reporting of wages subject to the tax.⁸¹

76. See Branch, *supra* note 64, at 124. Branch states that men's participation is that he "helps" with "her" housework; she hires and instructs the cleaning woman and the baby-sitter. In other words, we have progressed to the point where a woman is allowed to delegate her responsibilities in the home, but it is still clearly her responsibility to make sure the children are cared for and the house is clean.

Id.

77. See JOHN S. CARROLL, HOW TAXPAYERS THINK ABOUT THEIR TAXES: FRAMES AND VALUES IN WHY PEOPLE PAY TAXES 43 (Joel S. Slemrod ed., 1992).

78. See ERIC RICE, THE CORPORATE TAX GAP: EVIDENCE ON TAX COMPLIANCE BY SMALL CORPORATIONS IN WHY PEOPLE PAY TAXES 125 (Joel Slemrod ed., 1992).

79. See Rosenberg, *supra* note 44 (reporting that compliance is higher only among wage earners whose taxes are withheld at the source).

80. See *id.*

81. When the household employer pays the worker in cash, it is impossible for the IRS to accurately assess the wages paid. Of course, any statements by the employer and/or employee will be completely self-serving and unreliable inasmuch as it is unrealistic to think that the employer

The IRS has failed to diligently enforce the nanny tax provisions. Few cases of employment tax evasion are prosecuted. While the IRS has threatened to step up its enforcement efforts with few results, compliance with the nanny tax provisions continues to decrease.⁸²

The INS has faced similar problems in the enforcement of employment laws. In 1986, Congress passed the Immigration Reform and Control Act ("IRCA").⁸³ IRCA requires employers to verify an employee's eligibility to work in this country and imposes fines and possible imprisonment on employers who knowingly hire undocumented workers.⁸⁴ IRCA applies to all employers, including those employers who employ individuals to work in private homes, such as nannies.⁸⁵

Enforcement of IRCA has been limited to larger employers of low paid service workers, such as restaurants, hotels, landscapers and cleaning services.⁸⁶ Although domestic employers who fail to comply with the law are at risk of receiving minor fines if caught,⁸⁷ the INS has issued statements that the provisions of IRCA will not be imposed against household employers, thereby allowing the practice of hiring illegal workers to continue unabated.⁸⁸

III. PRIVATE FAILURES/PUBLIC BURDENS

Due to factors such as the number of full-time women professionals, an increase in the number of American families earning more than \$100,000 per year, and the number of immigrants entering the United States, the number of women employed as domestic workers should be on the rise.⁸⁹ In fact, quite the

would fail to pay the tax, the employee would fail to report the income, and they would be completely truthful with the IRS.

82. See Patrice Apodaca, *INS Preparing for "Nanny Tax" Crackdown?*, L.A. TIMES, Jan. 31, 1996, at D-6; Ben Wildavsky, *More Calls to IRS About Domestic Employees; Zoe Baird Case Raises Awareness*, S.F. CHRON., Jan. 23, 1993, at C10 (discussing an active investigation of only 50 cases in a major metropolitan area, which is indicative of how many non-compliance cases fall through the cracks).

83. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at scattered sections of 8 U.S.C.).

84. 8 U.S.C. § 1324a (1994 & Supp. III 1997). The regulations provide that a person who engages in a pattern or practice of violation of the Act shall be subject to fines of no more than \$500 for each unauthorized worker, imprisonment for not more than 6 months, or both. 8 C.F.R. § 270.3(b) (1998).

85. *Id.*

86. See Stanley Mailman, *The Employer as Immigration Inspector*, N.Y. L.J., Apr. 22, 1996, at 3.

87. See *id.* In addition to receiving minor fines, high-profile employers may also receive damaging publicity. See *id.*

88. See *id.*

89. See David Frum, *Domestic Workers*, CURRENT, May 1997, at 39. Frum reports that roughly 15 million American women work as professionals and that an equal number of immigrants have entered the country since 1970. Almost six million American households earn more than

opposite is occurring. As recently as 1972, nearly 1.5 million workers, virtually all women, worked as domestic servants.⁹⁰ Over the past twenty-five years these numbers have collapsed. By 1983, less than a million workers were employed as full-time domestics.⁹¹ The Department of Labor projects that this shrinkage is likely to continue with the number of women working as in-home, full-time child care providers (a subdivision of the larger domestic worker category) dropping from its current level of 350,000 to between 75,000 and 200,000 over the next ten years.⁹²

Both legal and illegal workers are employed as child care providers.⁹³ This is a distinction that often dictates the worker's salary, benefits, hours, and working conditions. The competition to find and hire "qualified"⁹⁴ legal domestic help has become fierce.⁹⁵ Salaries have skyrocketed, as have nannies'

\$100,000 per year (twice as many as in 1980) and almost one million families earn more than \$200,000 per year. *See id.*

90. *See id.*

91. *See id.* Only 980,000 women worked as full-time domestics in 1983; only 820,000 in 1995. *See id.*

92. *See id.*

93. *See Delaney, supra* note 15, at 310-11. Falling within the legal classification of legal child care providers, but outside of the "nanny tax" issues are au pairs. The Au Pair Exchange Visitor Program allows young people, who are not domestics by vocation, to work temporarily in the home of American host families. Au pairs receive free room and board as well as a salary of approximately \$100 per week from the host family. Employers using au pairs as child care providers do not have to comply with the "nanny tax" provisions because services provided by au pairs are not subject to FICA or FUTA withholding. *See id.*

See also Kathy Boccella, *Nanny Shortage Reaches Crisis Point Qualified Caretakers Fetch Top Dollar, Get "Posh" Jobs*, TIMES-PICAYUNE, Dec. 26, 1998, at R9. While using an au pair as a nanny presents an alternative to costly legal, or illegal, employment, the publicity received following the death of an eight-month-old baby while under the supervision of a British au pair, Louise Woodward, has had a chilling effect on the hiring of au pairs. As a result of the case, the number of au pairs plummeted, decreasing from a high of 11,000 in the mid 1990s to just 3000 in 1997. *See id.*

94. I cannot say with certainty what "qualified" means. My opinion, which is purely anecdotal, based on research for this Article and from what I have observed as a parent of a toddler in a major metropolitan area, is that "qualified" means English proficient—a buzz word for English as a first language—having a driver's license, and some college education. Based on the qualifications given, "qualified" nannies tend to be Anglo- or European-American. It is certainly true that there is a distinction between working as a "nanny" and a "housekeeper" who also watches the children. I employ a worker from Central America as a "nanny" meaning her primary obligation is to care for my child. However, she has been referred to by others as my "Girl" my "Maid" and my "Housekeeper," but never as my "Nanny." I can only speculate that if she was born in Europe the nomenclature would be different.

95. *See Boccella, supra* note 93, at R9. One prospective household employer unsuccessfully attempted to lure a nanny by offering a salary of \$500 per week, paid vacations and holidays, overtime, use of a car, and tuition reimbursement. *See id.*

demands. In major cities a full-time nanny receives a salary of about \$400 per week.⁹⁶ For college-educated nannies that amount can exceed \$1000 per week.⁹⁷ Once found, a competent, reliable, educated nanny is a coveted member of the household to be retained at all costs. Nannies demand and receive perks such as cars, mobile telephones, health care benefits, and paid vacations.⁹⁸ In this seller's market, qualified nannies control the parameters of the employment relationship.

The picture is quite different for illegal immigrant child care workers and those American workers who are considered less "qualified." In-home child care providers are unprotected by labor laws.⁹⁹ Domestic workers are denied the opportunity to organize, leaving employers with the power to dictate the rates of pay, working hours, and other terms of employment.¹⁰⁰ The relationship between household employers and employees transpires behind closed doors, facilitating exploitation. This is particularly true with respect to live-in nannies. Live-in nannies may be required to work longer hours. Further, the conditions of their employment may be ill-defined because the employee is in the home and continuously available to the employer.

For illegal immigrant nannies, the balance of power weighs even more heavily in favor of the employer.¹⁰¹ Immigration status restricts job mobility making illegal immigrant child care providers more dependent on employers. Illegal immigrant nannies may feel powerless to question the terms of their employment for fear of employer retribution. Illegal immigrant workers are unable to utilize governmental agencies to enforce their legal rights. Fear of INS detection isolates illegal immigrant workers from other household employees.¹⁰²

The high cost of hiring a college educated, English-speaking child care provider has left many families looking for a less skilled replacement. The economics of domestic work and the creation of an underground domestic service market has attracted a legal as well as illegal immigrant work force.¹⁰³ This has changed the complexion of domestic help. Twenty years ago domestic service was a black woman's job with nearly forty percent of domestic workers being African American.¹⁰⁴ In 1995, fewer than seventeen percent of domestic workers were African American.¹⁰⁵ The thriving illegal child care market depresses

96. *See id.*

97. *See id.*

98. *See id.* A survey conducted by the *Nanny News* found that nearly all nannies got paid vacations and holidays, over half got paid sick days, many received health insurance, and several received other perks such as cash bonuses and club memberships. *See id.*

99. *See supra* note 68 and accompanying text.

100. Silbaugh, *supra* note 63, at 72.

101. *See generally* Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553, 533-34 (1989).

102. *Id.*

103. *See infra* note 123 on the number of immigrants working as child care providers.

104. *See* Frum, *supra* note 89.

105. *See id.* This trend can be attributed to a number of factors: African American women no longer want to do the work, employer prejudice in hiring household workers and "white guilt"

wages and benefits for all but a few domestic workers. These economic and cultural trends have stigmatized domestic work, encouraging unskilled American workers to take other jobs even if they pay less.¹⁰⁶

Many nannies acquiesce in their employer's evasion of the tax laws. Illegal immigrant workers, fearful of INS detection, cannot establish a legal employment relationship for purposes of paying the tax; therefore they only receive wages under the table. Low-paid legal workers prefer to work illegally to increase the net amount of their take home pay. Other household workers feel powerless in the employment situation. Unable to enforce their legal rights, they accept the terms of employment as offered by the employer. Because it is common practice for domestic employers not to pay or to withhold employment taxes, an employee seeking legal employment is restricted to fewer positions.

Working underground is not without its long term costs to domestic employees. Social security payments are made based on FICA contributions from the employer and deductions from the employee's paycheck.¹⁰⁷ If the employer fails to pay employment taxes, the employee may not be entitled to receive social security payments upon retirement. Without payment of the FUTA premiums, the employee will not be entitled to federal unemployment payments either.¹⁰⁸ Additionally, failure to comply with the state employment tax requirements disqualifies the child care provider from receiving state unemployment and disability compensation.¹⁰⁹

Illegal employees are also excluded from other entitlements associated with the wage labor market. Illegal employees have no verifiable wages, making it virtually impossible to qualify for a mortgage, rent an apartment, or finance an automobile. Illegal workers have no work history to transition into other types of employment. A domestic worker may receive a letter of recommendation to secure other domestic work, but not work in a legal wage market. The inability to establish credit, access traditional financial services, and transition into other wage labor markets restricts upward economic mobility, thereby reinforcing the "servant" underclass.

The short-term benefit of avoiding employment and income taxes may not be worth the long-term price.¹¹⁰ The income tax system is being used to deliver

over perpetuating black servitude. *See id.*

106. This applies to uneducated and unskilled workers. College educated nannies are heavily in demand, receiving high salary and benefits. *See supra* notes 96-98 and accompanying text.

107. *See* I.R.C. §§ 3101, 3201, 3221 (1994 & Supp. II 1996 & West Supp. 1998).

108. The Federal Unemployment Tax Act ("FUTA") originally exempted domestic workers. Congress amended FUTA to cover domestic employees earning more than \$1000 per quarter. *See* Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 301 (1994).

109. *See id.*

110. Assuming an average salary of \$14,000 for a single full-time child care provider the employment tax liability would be \$1071 and the federal income tax liability as high as \$1057.50, assuming a standard deduction of \$4250, personal exemption of \$2700 and a 15% tax rate.

substantial work-related federal income transfers to employees.¹¹¹ Federal tax subsidies, such as the earned income credit, increase employee cash wages in excess of federal tax liability.¹¹² The earned income credit is a federal tax subsidy, which can only be received by workers who report items of income by filing an income tax return.¹¹³

The earned income credit is a refundable income tax credit provided to qualified workers at a low to moderate income level.¹¹⁴ The credit was established to encourage work by supplementing employee wages and offsetting the increasing cost of living and social security taxes. To receive the credit the employee must file an income tax return. If the employee is eligible, the employer may make the advanced earned income credit payment directly to the employee each pay period.¹¹⁵

An employee is eligible to receive the credit if the employee earned less than \$25,760 and has at least one qualifying child living in the same household or if the employee earned less than \$29,290 and had more than one qualifying child living in the same household.¹¹⁶ Employees without a qualifying child may still receive the credit if they earned less than \$9770.¹¹⁷ For nannies whose salaries hover around minimum wage, receipt of the earned income credit increases the employee's net "take home" pay. However, many domestic workers unfamiliar with the income tax system may not be aware of this federal tax subsidy.

Noncompliance with the nanny tax requirements has cost employers as well, because federal child care subsidies are delivered through the tax code. Federal child care subsidies include the dependent child care credit, as well as employer dependent care assistance programs.¹¹⁸ To receive these subsidies, the taxpayer

111. See Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173, 175 (1995) (noting that one example of the integration of the tax and income transfers systems is the expansion of the refundable earned income tax credit).

112. See *infra* notes 113-17 and accompanying text for a discussion of the benefits paid under the earned income credit.

113. The earned income credit reduces the amount of taxes the employee owes and may provide a refund in excess of tax liability. The credit is received by completing IRS Form W-5 and Line 59 on Form 1040.

114. IRC § 32 allows a refundable credit against the income tax. I.R.C. § 32 (1994 & Supp. II 1996).

115. An employee is eligible to receive advanced earned income credit payments if the following three conditions are met: (1) the employee has at least one qualifying child; (2) the employee expects that her 1999 earned income and modified adjusted gross income will each be less than \$26,928, including spousal income if the employee plans to file a joint return; and (3) the employee expects to be able to claim the earned income credit in the applicable year. See Department of the Treas., I.R.S. 1998 Form W-5.

116. See I.R.C. § 32.

117. See *id.*

118. See *infra* notes 132-37 and accompanying text for a discussion of dependent care assistance programs.

must provide child care provider information, such as the name, social security number, and address of the child care provider.¹¹⁹ Receipt of the currently available federal tax subsidies, while not enough to encourage employer compliance, can alleviate part of the burden associated with paying the tax.

The federal revenue lost by domestic workers' unreported income results from billions of dollars in unreported payments for child care.¹²⁰ Depletion of the federal income tax base is not the only cost of unreported domestic service income; the ultimate burden for providing for individuals unable to provide for themselves and their families is borne by society at large. Without social security, disability, and unemployment compensation, domestic workers are more susceptible to dependence on other government programs such as welfare if they become sick or lose their jobs.¹²¹

IV. MODELS FOR REFORM

It is impossible, absent extreme punitive measures such as intruding on the privacy of the employer's home, and coordination between federal agencies such as the INS and the IRS, for the government to deter the hiring of illegal domestic workers. Reform must come through encouraging taxpayers to voluntarily comply with the employment tax laws.

Compliance can be increased by attacking three fronts: enforcement, information, and incentives. It is only when household employers receive incentives, fear retribution, and are informed of how to comply with the law that any increase in the voluntary payment of employment taxes will occur.

A. Enforcement

Enforcement of the nanny tax provisions provides the best weapon to combat evasion of the employment taxes by household employers. To enforce the law, taxpayers subject to the tax must be identified and stiff penalties must be imposed. Despite the flagrant flouting of the law by household employers and the publicity surrounding the issue in recent years, there has been very little enforcement of the nanny tax provisions. The IRS has suggested more diligent enforcement of the nanny tax provisions for some time with few results.

Enforcement of the nanny tax provisions is easier than enforcing other IRC

119. Taxpayers who want to take the dependent Child Care Credit or receive employer provided child care benefits must complete Form 2441. The form requires the taxpayer to furnish the providers name, address, social security number and the amount paid. Department of the Treas., I.R.S. Form 2441.

120. See Larry Tumell et al., *Nannygate: An Overview Of Payroll Tax Rules and Immigration Laws*, J. ACCT., July 1993, at 36.

121. These workers are often immigrants. In California, the percentage of immigrant child care workers has jumped from 20% in 1980 to 56% in 1996. See Patrick J. McDonnell, *Jobs Exist for Immigrants, Study Finds Labor: Report Says Unskilled New Arrivals Are "Structurally Embedded" in the Economy, Including Growing High Tech Sector*, L.A. TIMES, May 4, 1998, at B1.

provisions because many taxpayers with dependent children are a self-identifying group. Taxpayers with dependent children are entitled to a dependency exemption.¹²² For taxpayers taking the exemption, the age, name, and social security number of the dependent child must be provided on a taxpayer's return.

The review of dependency information provides a valuable tool in enforcing the nanny tax provisions. The IRS can identify returns that list young children, particularly children who are not yet of school age. These returns can be further examined to determine if both parents work outside the home. Other factors can be reviewed based on information contained in the returns, such as gross income and the deduction of expenses paid to child care providers. Collecting this information allows the IRS to trigger certain returns for further review.

Dependency information review will not capture all nanny tax evaders. Taxpayers whose adjusted gross income exceeds certain threshold amounts will be unable to take the deduction.¹²³ These high-income taxpayers do not provide dependency information on their returns. Unfortunately, it is taxpayers whose income exceeds the dependency exemption thresholds that are more likely to use in-home child care. Requiring all taxpayers with dependents under a certain age to list the names, ages, and social security numbers of any dependents would allow the IRS to fairly evaluate the returns of all taxpayers who may be employing a nanny.

Changing reporting requirements for payment of the nanny tax can also aid in enforcement. Currently, certain wages are exempt for purposes of paying the tax. Exempt wages include wages paid to teenage baby-sitters, other household workers under the age of eighteen, wages under \$1200 paid for the calendar year, and wages paid to certain family members. Wages paid to au pairs are also not subject to the nanny tax requirements.¹²⁴ Employers hiring family members and au pairs should be required to file an informational return listing the name, address of the child care provider, and the wages paid for the year. This can help the service in weeding out taxpayers that are not required to pay the tax.

Nanny taxes are currently reported on Line 55 of the 1040 individual tax form.¹²⁵ Line 55 requires the amount owed for social security and Medicare taxes for household employees. A taxpayer who fails to accurately assess and report taxes owed on their Form 1040 is declaring under penalty of perjury that she did not employ a household employee during the tax year. Taxpayers who fail to pay income taxes owed are subject to interest and penalties on the amount

122. IRC § 151 allows a personal deduction (exemption) in calculating taxable income, with an additional exemption for each dependent. I.R.C. § 151 (West Supp. 1998). IRC § 152 defines a "dependent" to include a child of the taxpayer's over half of whose support was received from the taxpayer. I.R.C. § 152.

123. IRC § 151(d)(13) provides that any adjusted gross income that exceeds the threshold amount shall be reduced by two percentage points for each \$2500 by which the taxpayer's adjusted gross income exceeds the threshold amount for 1998. I.R.C. § 151(d)(13).

124. I.R.C. § 3121(b)(21) (as amended by § 2(a)(1)(C) of the Social Security Domestic Employment Reform Act, Pub. L. No. 103-387, 103d Cong. 2d Sess. (1994)).

125. Department of the Treas., I.R.S. 1998 Form 1040, Line 55.

of the deficiency.¹²⁶ These penalties apply to taxpayers who fail to pay employment taxes, which are required to be reported on the employer's tax return.¹²⁷ A penalty is imposed on a taxpayer who without reasonable cause fails to pay tax.¹²⁸ An accuracy-related penalty is imposed if the understatement is due to negligence.¹²⁹ Fraudulent underpayment of a tax required to be reported on the return may result in the imposition of a seventy-five percent penalty.¹³⁰

B. Information

Information must be given to household employers, as well as their tax preparers. Many taxpayers who are overwhelmed by paying taxes on wages and other items of income refuse to pay an additional tax. Household employers who prepare their own tax returns may be unable to grasp the complications of paying employment taxes. While there are services that will do this for household employers, these services are expensive.

Household employers must be given information on ways to reduce the federal tax burden that comes along with hiring legal child care providers and complying with employment tax provisions. The child care tax credit provides a federal tax rebate that is available to defray at least part of the nanny tax expense. To receive the credit, the taxpayer must verify the amount of the expense and identify the child care provider.¹³¹ A second federal tax subsidy, which provides tax-free income to pay child care expenses, is the dependent care assistance program.¹³² This program authorizes employers to provide employees with tax-free dependent care assistance.¹³³

126. See I.R.C. § 6601(g).

127. Following the nanny tax scandal, Zoe Baird paid \$10,900 in taxes, interest penalties, and fines. See Robert L. Turner, *Cough Up, Counselor*, BOSTON GLOBE, Feb. 11, 1993, at 23.

128. IRC § 6651(a)(2) provides that a penalty is imposed when a taxpayer, without reasonable cause, fails to pay the tax. The penalty is 0.5% of the tax assessed each month until the tax is paid. The maximum amount of the penalty is 25%. I.R.C. § 6651(a)(2).

129. IRC § 6662(b) provides that the accuracy-related penalty is imposed if any part of the underpayment is due to negligence or disregard for the rules without the intent to defraud. I.R.C. § 6662(b).

130. See I.R.C. § 6663(a).

131. See *supra* note 119 and accompanying text.

132. IRC § 129(a)(1) provides that the gross income of an employee does not include amounts paid or incurred by employers for dependent care assistance provided to employees. I.R.C. § 129(a)(1). See also Economic Recovery Tax Act, Pub. L. No. 97-34, § 124(e), 95 Stat. 198-201 (1981) (codified at 26 U.S.C. § 129 (1994 & Supp. II 1996)).

133. IRC section 129(d)(1) describes a dependent care assistance program as a separate written plan of the employer for the exclusive benefit of his employees to provide them with dependent care, which meets the following requirements: (1) Discrimination—The contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees; (2) Eligibility—The program benefits a classification of employees set up by the employer that is found by the Secretary of the Treasury to be non-discriminatory; (3) Principal shareholders or

Many dependent care assistance programs are implemented through a salary reduction plan, which costs the employer nothing, but allows the employee to deduct the amount of dependent child care expenses from her gross income and seek reimbursement from the plan for the child care expenses when they are incurred.¹³⁴ When seeking reimbursement for child care expenses, the employee must provide the employer with the child care provider's name, address, and social security number.¹³⁵ Technically, these reporting requirements should restrict receipt of child care credit and dependant care assistance benefits to taxpayers who employ legal nannies.

Employees participating in an employer-provided dependent care salary reduction program may exclude from income taxation up to \$5000 of their wages to pay for child care expenses.¹³⁶ The \$5000 is a deduction from income, allowing wealthier taxpayers to receive a larger tax subsidy. Taxpayers participating in a dependent care assistance program whose income is taxed in the highest marginal tax rate will receive a child care subsidy of approximately \$2000,¹³⁷ an amount that would cover all, or at least a significant portion of, the nanny tax.

Household employees must also be informed of their employment rights.

owners—Not more than 25% of the amounts paid or incurred by the employer during the year are provided for shareholder or owners each of whom owns more than five percent of the stock or the capital or profit interests of the employer; (4) Notification of eligible employees—The employer provides reasonable notification of the availability and terms of the program to eligible employees; (5) Statement of expenses—The plan furnishes to an employee a written statement of amounts paid or incurred by the employer in providing dependent care assistance to the employee; (6) Benefits—The average benefits to employees who are not highly compensated under all employer plans are at least 55% of the average benefits provided to highly compensated employees under all employer plans. Additionally, in the case of benefits provided under a salary reduction agreement, the plan may disregard employees whose compensation is less than \$25,000; (7) Excluded employees—The following employees may be excluded from the eligibility and benefits considerations: (A) Employees who have not attained the age of 21 or completed one year of service (as defined in IRC § 410(a)(3)), and (B) Employees who are not covered in the program who are covered by a collective bargaining agreement between employee representatives and one or more employees, if it is found that dependent care benefits were the subject of good faith bargaining; (8) The program is not required to be funded. I.R.C. § 129(d)(1).

134. See BLANK AND WILLIAMS, *CHILD CARE: WHOSE PRIORITY? A STATE CHILD CARE FACT BOOK* 16 (1985).

135. IRC § 21(e)(9) requires the tax payer to provide this information with respect to a service provider to receive dependent care credit. I.R.C. § 21(e)(9) (1994).

136. IRC § 129(a)(2) provides that the amount, which may be excluded for dependent care assistance, shall not exceed \$5000 (\$2500 in the case of a separate return filed by a married individual). I.R.C. § 129(a)(2) (West Supp. 1998).

137. The highest marginal tax rate imposed by IRC § 1 is 39.6% and is imposed on taxable income over \$250,000 for married individuals filing joint returns, heads of households, and unmarried individuals, and on taxable income over \$125,000 for married individuals filing separate returns. I.R.C. § 1.

Domestic employees may be unaware that their employers are required to pay employment taxes on their behalf. Household employees must be provided with information on the benefits associated with legal employment, such as eligibility for social security and unemployment benefits. Household employees must also be informed of their eligibility to receive the earned income credit. Absent this information, workers are less likely to demand the establishment of a legal employment relationship.

IV. PROPOSALS FOR CHANGE

Although limited child care credits have been permitted under the IRC, a full deduction for child care expenses has been rejected.¹³⁸ Child care has been considered indistinguishable from other nondeductible personal expenses such as food, clothing, and shelter. When an individual taxpayer is allowed to deduct personal expenses, the integrity of the income tax system is threatened, because the government is paying for part of the taxpayer's consumption while others, who are unable to take the deduction, pay the entire cost.¹³⁹ However, tax incentives are provided to encourage taxpayer consumption in particular areas. The classic example is the deduction of home mortgage interest.¹⁴⁰ Homeowners receive a federal tax rebate of a portion of their personal living expenses,¹⁴¹ while renters do not. The efficient implementation of social policy has traditionally justified the vertical inequities created by tax expenditures. Inadequacies in encouraging nanny tax compliance support a deduction for salary paid to in-home child care providers in the current child and dependent care credit.

Household employer compliance with the federal employment tax laws may chill the hiring of illegal immigrant child care providers. This is not the intended

138. See *infra* Parts IV.B.1-2 for a discussion of the deductibility of child care expenses.

139. See Wendy Gerzog Shaller, *Limit Deductions for Mixed Personal/Business Expenses: Curb Current Abuses and Restore Some Progressivity into the Tax Code*, 41 CATH. U. L. REV. 581 (1992).

140. From its adoption in 1913, the federal income tax has always contained a deduction for personal residence interest paid by a taxpayer. The deduction of home mortgage interest is one of the oldest tax expenditures in the IRC. The legislative purposes in granting the expenditure is unclear. See TAX BREAKS: AN INTRODUCTION TO TAX EXPENDITURES (W. Barnes ed., 1985).

141. IRC § 163(h) permits the deduction of qualified home residence interest. Qualified home residence interest means interest on a mortgage to acquire or substantially improve the taxpayer's principal residence and one other residence. The maximum mortgage amount on which interest is deductible is one million dollars. Section 163 also permits the deduction of home equity interest when there is adequate equity in the property and the promissory note is secured by the taxpayer's property. The maximum loan amount on which interest may be deductible as home equity interest is \$100,000. However, unlike acquisition indebtedness, the proceeds of a home equity loan do not have to be used to improve the property and can be used for any taxpayer purpose. If taxpayer A purchases a Mercedes 500SL for \$100,000, which is financed with the proceeds of a home equity loan, the interest will be deductible while taxpayer B who uses dealer financing will be unable to deduct the interest on the loan. I.R.C. § 163.

result. The proposals are suggested to improve the working conditions for all domestic employees, legal and illegal. If a critical need for child care providers exists, other policies must be implemented to enable families to employ undocumented workers.¹⁴²

A. The Child Care Credit

Historically, child care costs have been treated as inherently personal, nondeductible expenses. This is the result even in the case of two-earner families, where child care is necessary for the production of income.¹⁴³ In 1954 a limited deduction¹⁴⁴ for child and dependent care expenses was added to the IRC.¹⁴⁵ The child care deduction could be taken when the woman caretaker of the family was either working or seeking employment.¹⁴⁶ In 1964, the deduction was expanded to include husbands whose wives were incapacitated or institutionalized.¹⁴⁷ In 1976, the child care deduction was replaced by a child care credit.¹⁴⁸ The amount of the child care credit has varied since 1976;¹⁴⁹ however, a child care credit, rather than a deduction, has been retained since that time.¹⁵⁰

IRC § 21 provides the current credit for employment related household and

142. See generally Delaney, *supra* note 15. One policy is relaxation of the immigration laws to permit parents to hire nonresident child care providers. See *id.* at 317-26.

143. See *Smith v. Commissioner of Internal Revenue*, 40 B.T.A. 1038 (1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

144. The maximum amount deductible under IRC § 214 was \$600, regardless of the number of eligible children. If the child care provider also performed other household duties, the child care expenses had to be prorated. See S. REP. NO. 83-1622, at 220 (1954).

145. Section 214 allowed an itemized deduction for the costs of caring for a child under the age of twelve. I.R.C. § 214 (1954). The deduction also applied to physically or mentally incapacitated dependents. See S. REP. NO. 83-1622, at 36 (1954); H.R. REP. NO. 83-1337, at 30 (1954). The expenses were limited to employment related child care expenses. Expenses were considered to be employment related only if they were incurred to enable the taxpayer to be employed. Therefore, the taxpayer had to be gainfully employed or actively searching employment. See Treas. Reg. § 1.214A-1(c)(1)(i) (1954).

146. See Stanfield, *supra* note 4, at 220.

147. See The Revenue Act of 1964, Pub. L. No. 88-272, § 212(a), 78 Stat. 19, 49 (1964).

148. See Tax Reform Act of 1976, I.R.C. § 44(a), Pub. L. No. 94-455, § 504, 90 Stat. 1520, 1563-66 (1976).

149. The Economic Recovery Tax Act of 1976 increased the amount of the credit. Pub. L. No. 97-34, § 124, 95 Stat. 172, 197-201 (1981). The Tax Reform Act of 1984 renumbered the credit to IRC § 21. Pub. L. No. 98-369, §§ 471, 474, 98 Stat. 494, 825-26, 830-47 (1984).

150. As a credit, there is a dollar for dollar reduction in the tax owed. Therefore, the amount of the creditable child care expense is not affected by the taxpayer's tax bracket. Also, the amount is refunded without regard to whether the taxpayer itemizes or takes the standard deduction. See I.R.C. § 21 (West Supp. 1998).

dependent care expenses.¹⁵¹ The credit is allowed for dependent child care expenses, which are necessary for employment for taxpayers who maintain a household, which includes a dependent under the age of thirteen, or a dependent or spouse of the taxpayer who is physically or mentally incapable of caring for himself.¹⁵² The creditable amount is a percentage of the employment related dependent care expenses paid by the taxpayer during the taxable year.¹⁵³ The percentage is thirty percent, reduced by one percentage point for each \$2000 that the taxpayer's adjusted gross income exceeds \$10,000.¹⁵⁴ However, the percentage cannot be reduced below twenty.¹⁵⁵ The maximum amount of employment related expenses that may be considered for the credit cannot exceed \$2400 for one qualifying individual and \$4800 for two or more qualifying individuals.¹⁵⁶

The child care credit is one way the federal government attempts to assist working families defray the costs of child care. The child care credit is the largest federal child care subsidy.¹⁵⁷ Middle class taxpayers—individuals whose

151. IRC § 21 allows the deduction of employment related dependent care expenses. Employment related expenses means amounts paid for expenses for household services and the care of a qualifying individual, but only if such expenses are incurred to enable the taxpayer to be gainfully employed for any period for which there are one or more qualifying individuals with respect to such taxpayer. I.R.C. § 21(b)(2).

152. Only employment related expenses for the care of qualifying individuals are creditable. IRC § 21(b)(1) defines a "qualifying individual" as:

- (A) a dependent of the taxpayer who is under the age of 13 and with respect to whom the taxpayer is entitled to a deduction under section 151(c),
- (B) a dependent of the taxpayer who is physically or mentally incapable of caring for himself, or
- (C) the spouse of the taxpayer, if he is physically or mentally incapable of caring for himself.

I.R.C. § 21(b)(1). IRC section 21(b)(2) defines "employment-related expenses" as: amounts paid for the following expenses, but only if such expenses are incurred to enable the taxpayer to be gainfully employed for any period for which there are 1 or more qualifying individuals with respect to the taxpayer:

- (i) expenses for household services, and
- (ii) expenses for the care of a qualifying individual.

Such term shall not include any amount paid for services outside the taxpayer's household at a camp where the qualifying individual stays overnight.

Id. § 21(b)(2).

153. IRC § 21(a)(1) provides that "in the case of an individual who maintains a household which includes as a member one or more qualifying individuals . . . there shall be allowed as a credit . . . an amount equal to the applicable percentage of the employment-related expenses . . . paid by such individual during the taxable year." I.R.C. § 21(a)(1).

154. See I.R.C. § 21(a)(2).

155. See *id.*

156. IRC § 21(c) provides dollar limitations on the creditable amount. I.R.C. § 21(c).

157. Nantell, *supra* note 16, at 909. In 1993, a \$2.5 billion IRC § 21 child care and

taxable income is between \$20,000 to \$50,000 per year—who have two qualifying dependents are the primary beneficiaries of this federal tax subsidy.

The child care credit is a non-refundable tax credit, meaning that the taxpayer may not take the credit if the creditable amount exceeds the taxpayer's income tax liability. The result is that the poor, taxpayers whose income is below the amount required to file a return, receive no federal tax child care subsidy at all because the amount of the credit exceeds their income tax liability. The inadequacies of the dependent and child care credit in assisting very poor families in paying for child care is a criticism expressed by commentators who believe the credit should be used to deliver child care services to the poor.¹⁵⁸

In the context of domestic service and payment of employment taxes, the current child care credit is an inadequate incentive to encourage household employees to comply with the nanny tax requirements. First, and foremost, the carrot is just not sweet enough. The adjusted gross income of an employer employing a full-time legal nanny is likely to exceed \$30,000. For taxpayers with adjusted gross income that exceeds that amount, the credit is restricted to \$480 (twenty percent of \$2400) if they have one qualifying dependent or \$960 (twenty percent of \$4800) if they have two qualifying dependents.¹⁵⁹ The maximum credit amount is a fraction of what it costs a household employer to comply with the nanny tax provisions.¹⁶⁰

The current child care credit, if increased, could stimulate nanny tax compliance by providing a greater incentive to use legal child care. The creditable amount has not been adjusted for inflation since 1982, causing a forty-five percent decrease in the credit's actual value.¹⁶¹ Adjustments to the credit for

dependent tax credit was given to over 600 million families.

158. See Nantell, *supra* note 16, at 937, 939-41 (noting the short-coming of a non-refundable child care credit); see also Jonathan Barry Forman, *Beyond President Bush's Child Care Tax Credit Proposal: Towards a Comprehensive System of Tax Credits to Help Low-Income Families with Children*, 38 EMORY L.J. 661 (1989) [hereinafter *Beyond President Bush's Child Care Tax Credit Proposal*]; Jonathan Barry Forman, *Using Refundable Tax Credits to Help Low-Income Families*, 35 LOY. L. REV. 117 (1989).

159. The amount of the credit has not even been increased to pace with rising employment costs. The applicable child care credit amount is calculated by multiplying the creditable employment related expenses by the applicable percentage. The percentage is phased down one point for each \$2000 by which the taxpayer's adjusted gross income exceeds \$10,000. See *supra* note 154 and accompanying text. Neither the applicable credit amounts nor the phase-down schedule are indexed for inflation and have not been increased since 1982. See *Beyond President Bush's Child Care Tax Credit Proposal*, *supra* note 158, at 661.

160. See Nantell, *supra* note 16, at 942. Professor Nantell provides the following illustration: A taxpayer paying \$1000 per month for in-home child care would owe an additional \$918 in nanny taxes for those wages. If the taxpayer only had one qualifying child, and adjusted gross income in excess of \$30,000, the maximum allowable child care credit would amount to only \$480. See *id.*

161. See *id.* at 938 (citing A.B.A. Sec. on Tax'n, *Report of the Child Care Credit Task Force*, 46 TAX NOTES 331 (Jan. 15, 1990)).

inflation would ensure that it keeps pace with the increased cost of all types of child care, including the salary of in-home child care providers. Apart from increasing the creditable amount, loopholes must be closed to prevent taxpayers who employ illegal workers from taking the credit.¹⁶²

One suggested solution, increasing the dependent and child care credit available for household employers, is inefficient in promoting the payment of employment taxes for a number of reasons. First, as a dollar for dollar reduction of the employers tax liability, the difficulties of adjusting the credit to correspond with the salary paid to a domestic worker prevents the use of a credit to offset this expense. Second, a credit for employment taxes paid on behalf of a household employee permits a tax rebate for taxes owed. Third, any attempt to increase the child care credit to employers of private nannies will be rejected as another attempt to provide tax relief to the rich.

B. Rethinking the Salary Deduction for In-Home Child Care Workers

This section addresses two issues: First, the deduction of child care expenses as an ordinary and necessary business expense for working parents, and second, the disallowance of a salary deduction for wages paid to child care employees.

1. *Child Care as an Ordinary and Necessary Business Expense?*—The IRC grants priority to the deduction of business expenses,¹⁶³ permits the deduction of expenses related to income-producing activities within restrictive limitations,¹⁶⁴ and disallows many personal deductions¹⁶⁵ that are unrelated to a trade or

162. See David Cay Johnston, *Despite an Easing of the Rules, Millions Evade "Nanny Tax,"* N.Y. TIMES, Apr. 5, 1998, at 1 (noting that tax payers have figured out ways to get a double benefit by evading the nanny tax requirements while still taking the child care credit).

163. Employer business expense deductions are subtracted from gross income in determining adjusted gross income, and as such are taken above the line. Deductions taken above the line are not subject to the two percent floor requirements of IRC § 67. I.R.C. § 67 (West Supp. 1998). Above the line deductions are also not subject to reduction under the overall limitation of itemized deduction rules in § 68. I.R.C. § 68. IRC § 62(a)(1) provides that deductions, which are attributable to a trade or business carried on by the taxpayer, are deductible from gross income if the trade or business does not consist of the taxpayer's performance of services as an employee. I.R.C. § 62(a)(1). Unreimbursed employee expenses are given a lower priority and are deductible as miscellaneous itemized deductions to the extent that they exceed two percent of adjusted gross income. I.R.C. § 67.

164. IRC § 212 allows a deduction for expenses associated with the production of income, the management, conservation, or maintenance of property held for the production of income, as well as expenses paid in the determination of any tax. I.R.C. § 212. IRC § 62(a)(4) provides that § 212 expenses related to the rental of real property may be deducted above the line. All other § 212 expenses are deductible below the line as miscellaneous itemized deductions. Therefore, deductions for income-producing expenses unrelated to rental activity are deductible only to the extent that they exceed two percent of the taxpayer's adjusted gross income. I.R.C. § 67(a). Section 212 deductions are itemized deductions that are reduced under IRC § 68.

165. Expenses are purely personal when they are unrelated to carrying on a trade or business

business or the production of income. The line between business and personal does not always shine bright. Some expenses directly related to the generation of income are allowed despite the fact that they cross the personal line. For example, commuting expenses between a taxpayer's home and office are nondeductible personal expenses, while commuting costs for travel between two jobs are deductible because they are required by the exigencies of business.¹⁶⁶ A deduction is allowed when a client is taken to lunch, but not when one is dining with a colleague.¹⁶⁷

Child care has never been considered a deductible cost of doing business. In 1940, the federal courts first considered the deductibility of child care expenses in *Smith v. Commissioner of Internal Revenue*.¹⁶⁸ In the *Smith* case, the taxpayers attempted to deduct the expenses of hiring a child care provider after Mrs. Smith, who had previously worked inside the home, re-entered the paid labor force.¹⁶⁹ The taxpayers argued that the child care expenses were ordinary and necessary business expenses.¹⁷⁰ The Board of Tax Appeals held that the child care expenses were not ordinary and necessary business expenses and denied the deduction.¹⁷¹ The *Smith* case exemplifies the sharp divide between tax deductions for personal, business, and income-producing activities. Following the *Smith* case, a limited federal tax deduction was allowed, prior to 1974, for dependent care, which enabled the taxpayer to work. However, in 1975, the deduction was replaced by the current tax credit.¹⁷²

or the production of income. Personal, living, and family expenses are generally non-deductible. See I.R.C. § 262(a). Deductions are allowed for some narrowly defined, purely personal items. See, for example, IRC § 163(h), which allows the deduction of qualified residence interest, IRC § 164(a)(1), which allows the deduction of state, local and foreign real property taxes, and IRC § 213, which allows the deduction of expenses for medical care. However, the deduction of these items may be limited. For example, only extraordinary medical expenses are deductible. IRC § 213(a) provides that there shall be allowed as a deduction the medical expenses paid during the year, not compensated for by insurance, to the extent that such expenses exceed 7.5% of adjusted gross income. I.R.C. § 213(a). Most personal deductions are itemized deductions, which are subject to reduction for high income taxpayers, under IRC § 68. Section 68 is an overall limitation on itemized deductions, which reduces itemized deduction by the lesser of three percent of the taxpayer's gross income over the applicable amount or 80%. The applicable amount of \$100,000 is adjusted annually for inflation. See I.R.C. § 68.

166. See I.R.C. § 162(a).

167. See generally Heen, *supra* note 111; Allan J. Samansky, *Child Care Expenses and the Income Tax*, 50 FLA. L. REV. 245 (1998); Brian Wolfman, *Child Care, Work, and The Federal Income Tax*, 3 AM. J. TAX POL'Y 153 (1984).

168. 40 B.T.A. 1038 (1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

169. See *id.* at 1039.

170. See *id.* The taxpayers attempted to deduct the expense of hiring a nursemaid to care for their infant child as an ordinary and necessary business expense under the Revenue Act of 1936, section 23(a).

171. *Id.* at 1040.

172. See Tax Reform Act of 1976, Pub. L. 94-455, § 504(a)(1), 90 Stat. 1563 (1976).

The current deductibility of child care expenses depends on who incurs the cost. Child care is considered an ordinary and necessary cost of doing business for an employer, who is entitled to deduct the cost of building and operating a child care facility. However, for the private household employer, child care is treated as a mere luxury unrelated to the production of income. The disparate treatment afforded individual child care expenses is more troubling when the individual is saddled with the responsibility of functioning as an employer for employment tax purposes. Imposition of employment tax requirements should entitle the individual employer to the same deduction for employing a child care as a corporate employer. This is not to suggest that individuals should be allowed to deduct the cost of maintaining a child care facility for their own children, but that a limited deduction is justified when an individual taxpayer is required to function as a provider of child care services for purposes of paying employment taxes.

2. *Salary Deduction for Wages Paid to Child Care Employees.*—The treatment of child care expenses as inherently personal, or as an expense incurred by a taxpayer in carrying on a trade or business, has received ample scholarly consideration. And while the personal versus business dichotomy is relevant in determining the deductibility of child care, it does not adequately address the issues particular to domestic employers. The question that must be answered is, whether a justification exists for treating the domestic employer/employee relationship differently from other employer/employee relationships.

Reasonable salaries that are incurred in connection with a taxpayer's trade or business are deductible from gross income.¹⁷³ The expenses must be directly related to the conduct of a trade or business and not just expenses like child care, which enable the taxpayer to go to work.¹⁷⁴ However, salaries need not be incurred in connection with an ongoing trade or business to be deductible. IRC § 212 provides for the deduction of salary expenses incurred by the taxpayer for the production or collection of income.¹⁷⁵

173. IRC § 162(a)(1) provides that "there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries and other compensation for personal services actually rendered." I.R.C. § 162(a)(1) (West Supp. 1998).

174. There is no provision in the IRC that permits the deduction of child care expenses unrelated to the production of income. A limited child care credit is provided under IRC § 21 to enable the taxpayer to work. I.R.C. § 21.

175. IRC § 212 provides that an ordinary and necessary expense may be deducted from income if it has been paid or incurred during the taxable year: (i) for the production or collection of income that will be included in the taxpayer's gross income; (ii) for the management, conservation, or maintenance of property held for the production of income; and (iii) in connection with the determination, collection, or refund of any tax. I.R.C. § 212. The Department of Treasury regulations refer specifically to the deduction of salaries by providing that fees for clerical help paid or incurred by the taxpayer held by him are deductible if they are paid for the production or collection of income, for the management, conservation, or maintenance of investments held by him, and are ordinary and necessary. Treas. Reg. § 1.212-1(h) (1998).

In *Higgins v. Commissioner*,¹⁷⁶ the IRS disallowed a deduction for salaries paid to clerical help and other fees associated with an office Higgins maintained to manage his personal investments.¹⁷⁷ The clerical workers retained in the *Higgins* case opened his mail and forwarded financial statements to him in France where he lived half of the year.¹⁷⁸ The clerical workers did not provide investment advice with respect to his stock trading and/or other financial dealings.¹⁷⁹ The United States Supreme Court disallowed the deduction, finding that the taxpayer's frequent investment activities were insufficient to overturn the decision of the Board of Tax Appeals that Higgins was not carrying on a trade or business.¹⁸⁰

The congressional reaction to *Higgins* was negative,¹⁸¹ prompting enactment of IRC § 212, which allows the deduction of expenses incurred for the production and collection of income, or for the maintenance of income-producing property unconnected to any trade or business carried on by the taxpayer.¹⁸² Section 212 and the accompanying Treasury Regulations expressly permit the deduction of salaries paid for clerical help for the management of personal investments.¹⁸³

There is no basis for distinguishing between salaries paid for carrying on a trade or business, salaries paid to clerical help for the management and conservation of income producing assets, and salaries paid to child care providers. Each of these employment relationships is treated the same for employment tax purposes.¹⁸⁴ Denial of a deduction for salary paid to domestic employees is supported only by the inequities caused by allowing some taxpayers to deduct child care expenses while others, who are often in lower tax brackets, cannot. However, permitting a taxpayer to take a salary deduction for the management of personal investments because he can afford to pay someone to

176. *Higgins v. Commissioner of Internal Revenue*, 312 U.S. 212 (1941).

177. *See id.* at 214. Higgins also held rental real estate that was managed by the same office. The expenses associated with the rental property were allowed as trade or business expenses. *See id.* at 215. However, the fees associated with the management of the investment portfolio were disallowed based on a finding that although the taxpayer's personal investment activities were extensive, regular and continuous, they did not amount to a trade or business. *See id.*

178. *See id.* The offices kept records, received checks, and made deposits as instructed by Higgins. *See id.*

179. *See id.* He sought permanent investments. Limited shifts in his investment portfolio were made under his direction. *See id.*

180. *Id.* at 218.

181. *See* JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION* 446 (10th ed., 1998).

182. I.R.C. § 212 (1994).

183. Treasury Regulation § 1.212-1(g) provides that fees for investment counsel, clerical help, office rent and similar fees incurred by the taxpayer are deductible if (1) they are paid or incurred by the taxpayer for the production of income or for the management, conservation, or maintenance of property; and (2) they are ordinary and necessary. Treas. Reg. § 1.212-1(g) (1998).

184. The only difference is that domestic employers are not subject to federal income tax withholding requirements.

open his mail provides a prime example of the inequities that are currently present in the IRC.

The current policy of treating the salary of women providing in-home child care as a personal luxury has had a detrimental effect on the market for domestic service.¹⁸⁵ The non-deductibility of child care expenses encourages household employers to cheat on their taxes by failing to report wages paid to household employees. This puts child care providers in an enviable position: They can, in fact, determine if they want to receive legal wages. When a worker's wages are deductible, the employer will report them to the IRS, regardless of how much the worker wants to be paid under the table.¹⁸⁶ On the other hand, the non-deductibility of wages perpetuates wage depression and allows an underground, often illegal, labor market to thrive.

A salary deduction for in-home child care providers legitimizes the employer/employee relationship. Treating child care workers as "real" employees lifts the veil of secrecy that shrouds domestic service. Implementation of a federal tax policy that recognizes domestic work as employment, and domestic workers as employees, is the first step toward nannies gaining parity with other workers with respect to pay, benefits, and working conditions.

CONCLUSION

The devalued status of domestic work is reflected in laws that fail to provide domestic workers with benefits afforded to other workers. Disregard for the interests of domestic workers is reflected in a federal tax policy that fails to enforce federal employment tax requirements and treats salaries paid to domestic workers differently from salaries paid to workers who provide labor outside of private homes. Absent the grant of true employee status to domestic workers, they will continue to be denied the employment benefits to which every laborer is entitled.

185. See Frum, *supra* 89 (theorizing that the market for domestic servants is choked by two pressures, one economic, the non-deductibility of child care expenses, the other cultural).

186. See *id.* Because a secretary's wages are deductible, the employer will report them even if the secretary would be preferred to be paid under the table. But when a nanny asks to be paid under the table, the employer loses nothing by winking at the illegality. See *id.*



THE RUGGED FEMINISM OF SANDRA DAY O'CONNOR

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"Is she or isn't she?" Since Sandra Day O'Connor's nomination to the Supreme Court in 1981, scholars have been unable to resist debating the existence and/or extent of her feminist credentials.¹ Although lively at times, ultimately this discussion is sterile. Focusing on whether Justice O'Connor is a "true" feminist inevitably overemphasizes a particular delineation of feminist orthodoxy² and neglects the nature of her contributions to issues that matter to women.³ In our view the more significant question is the one less often asked: What does Sandra Day O'Connor do when issues that affect the lives of women come before her? Does her gender inform her approach to what Professor

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1. See, e.g., Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?* 78 JUDICATURE 232 (1995); Susan Behuniak-Long, *Justice Sandra Day O'Connor and the Power of Maternal Legal Thinking*, 54 REV. POL. 417 (1992); Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134 (1993); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995); Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L. REP. 129 (1991); Margaret A. Miller, Note, *Justice Sandra Day O'Connor: Token or Triumph From a Feminist Perspective*, 15 GOLDEN GATE U. L. REV. 493 (1985); Barbara Palmer, Note, *Feminist or Foe? Justice Sandra Day O'Connor, Title VII Sex-Discrimination, and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159 (1991). For O'Connor's own views on the subject, see Sandra Day O'Connor, *Portia's Progress*, in *Centennial Celebration: A Tradition of Women in the Law, Madison Lecture*, 66 N.Y.U. L. REV. 1546 (1991).

2. There are many "feminisms" or schools of feminist thought including: radical feminism, cultural feminism, Marxist feminism, liberal feminism, lesbian feminism, and difference feminism. See JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* (1992); MODERN FEMINISMS: POLITICAL, LITERARY, CULTURAL (Carolyn G. Heilbrun & Nancy K. Miller eds., 1992).

3. In saying this, we do not claim that any one issue matters to all women or that all women agree about these issues, or indeed, that all women identify themselves as feminists. See THE ESSENTIAL DIFFERENCE (Naomi Schor & Elizabeth Weed eds., 1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

Katharine Bartlett calls "the Woman Question?"⁴

In this Article we explore Justice O'Connor's response to the woman question by looking at her opinions on matters traditionally perceived to be of interest to women or matters historically recognized as women's issues. This leads us to consider cases about women as physical and sexual beings and cases about women as nurturers and caretakers. In addition, we look at cases about individuals who, like women, have been traditionally perceived as dependent, vulnerable, and economically insecure. We do not claim that these are the only issues that matter to women. Clearly, the range of issues that matter to women is as broad as the Court's docket.⁵

I. A BRIEF BIOGRAPHY

We believe that Justice O'Connor's own life experiences profoundly color her jurisprudence.⁶ The story of Justice O'Connor graduating third in her class at Stanford Law School but unable to obtain a position at a law firm other than as a legal secretary is well known.⁷ Less often recounted are her other early experiences. Justice O'Connor was simultaneously a victim of gender discrimination and an extraordinarily sheltered and privileged woman. Brilliant, hard-working, and clearly ambitious, she overcame her initial (and probably never-ending) encounters with workplace discrimination. Her rise was meteoric.

Born in 1930, Justice O'Connor grew up during the Great Depression on a 260 square-mile cattle ranch that straddled the Arizona-New Mexico border.⁸ Her life on the ranch was not the typical childhood of a young girl of that era: She drove tractors, branded cattle, and fixed fences, activities that helped to

4. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990). The first use of the term "woman question" may have been Simone De Beauvoir's in *The Second Sex* xxvi (1957).

5. Issues such as sex discrimination, reproductive rights, sexual harassment, affirmative action and domestic violence are traditionally considered of particular concern to women. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* (2d ed. 1996); KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (2d ed. 1998).

6. As Justice Holmes reminded us, "The life of the Law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

7. See, e.g., NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 13 (1996); HAROLD WOODS & GERALDINE WOODS, *EQUAL JUSTICE: A BIOGRAPHY OF SANDRA DAY O'CONNOR* 19-20 (1985); O'Connor, *supra* note 1, at 1549.

8. See Ed Magnuson, *The Brethren's First Sister*, TIME, July 20, 1981, at 8. The size of the ranch varies with the source: WOODS & WOODS, *supra* note 7, at 8 (242 square miles); Carl Cannon, *Sandra Day O'Connor: 1981 The First Woman Justice on the U.S. Supreme Court*, WORKING WOMAN, Nov. 21, 1996, at 56 (300 square miles); Peter William Huber, *Sandra Day O'Connor*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1995, at 506-10 (Clare Cushman ed., 1995) (309 square miles). Three hundred square miles is approximately one-quarter the size of Rhode Island.

instill a belief that individual action can solve almost any problem.⁹ Perhaps less apparent to O'Connor as a young girl was the fact that New Deal programs were critical to saving the ranch from the economic devastation of the Depression.¹⁰

Because there was no school near the ranch, Justice O'Connor lived with her grandmother in El Paso during the school year to attend a private school.¹¹ She was an exceptional student, graduating from high school at the age of sixteen.¹² She went on to Stanford University and then to Stanford Law School, where she befriended the young William Rehnquist.¹³ While at Stanford she also met her future husband, John Jay O'Connor III.¹⁴

Despite her distinguished law school career, O'Connor did not receive a single offer to associate with a law firm after graduation. Her first job was as deputy attorney for San Mateo County, California.¹⁵ One year later, she followed her husband when he was drafted and posted to West Germany. There she worked as a civilian attorney for the United States Army.¹⁶

In 1957, after returning to the United States, Justice O'Connor gave birth to her first child.¹⁷ As a new mother, she opened a law practice in a suburban shopping center.¹⁸ She left the practice two years later when her second child

9. See Joan S. Marie, *Her Honor: The Rancher's Daughter*, SATURDAY EVENING POST, Sept. 1985, at 42. O'Connor's sister and brother, Ann and Alan, were born in 1938 and 1939. See Huber, *supra* note 8, at 506. O'Connor thus spent most of her first eight years as an only child on a remote ranch. Her early childhood friends were her parents, ranch hands, a bobcat, and a few javelina hogs. By the age of eight, Justice O'Connor was mending fences, riding with the cowboys, firing her own .22 rifle, and driving a truck. See WOODS & WOODS, *supra* note 7, at 10-11; Huber, *supra* note 8, at 507.

10. See WOODS & WOODS, *supra* note 7, at 8. For a compelling description of the impact of rural electrification on the lives of women, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 502-15 (1982).

11. See WOODS & WOODS, *supra* note 7, at 13; Marie, *supra* note 9, at 43. Except for summer vacations, O'Connor lived with her grandmother from kindergarten through high school, with a one-year interruption at age thirteen, when homesickness drew her back to Arizona. See Huber, *supra* note 8, at 507; Marie, *supra* note 9, at 43.

12. See MAVEETY, *supra* note 7, at 13; WOODS & WOODS, *supra* note 7, at 16; Magnuson, *supra* note 8, at 12.

13. See Cannon, *supra* note 8, at 56; Beverly B. Cook, *Justice Sandra Day O'Connor: Transition to a Republican Court Agenda*, in *THE BURGER COURT* 238 (Charles M. Lamb & Stephen C. Halpern eds., 1991); Magnuson, *supra* note 8, at 12.

14. See MAVEETY, *supra* note 7, at 13; WOODS & WOODS, *supra* note 7, at 17.

15. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 20; Magnuson, *supra* note 8, at 12.

16. See WOODS & WOODS, *supra* note 7, at 21; Magnuson, *supra* note 8, at 12; Marie, *supra* note 9, at 44.

17. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 22; Magnuson, *supra* note 8, at 12.

18. See WOODS & WOODS, *supra* note 7, at 22. Sources variously describe her office as a "neighborhood law practice," MAVEETY, *supra* note 7, at 14; "her own law firm in a Phoenix

was born.¹⁹ Her third and last child was born in 1962.²⁰ According to O'Connor:

I found that there was more work than I could do—to go to the office every day and take care of the children. I had a lovely woman who babysat for me with my first child, but she moved to California It made it impossible at that time to continue my law practice. I was out of the workforce as a regular paid employee for about five years, although I did a lot of volunteer work and other activities.²¹

Indeed, to characterize O'Connor as a "stay-at-home mom," would be quite misleading. During the five years when she did not practice law, she was extremely active in the Arizona Republican Party and in Barry Goldwater's 1964 presidential campaign.²²

In 1965, O'Connor was appointed an Assistant Attorney General for the State of Arizona.²³ Four years later she was appointed to fill a vacant state senate seat, to which she was twice re-elected.²⁴ After co-chairing Richard Nixon's Arizona re-election campaign, she became the first woman in the country to be elected majority leader of a state senate.²⁵

In 1974, running on a "law and order" platform, O'Connor was elected a Maricopa County Superior Court trial judge. Five years later, she was appointed to the Arizona Court of Appeals, where she served for less than two years before being nominated by President Reagan to the United States Supreme Court.²⁶

suburb," Magnuson, *supra* note 8, at 12; and a "small-town type of practice," Marie, *supra* note 9, at 44.

19. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 23.

20. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 23.

21. WOODS & WOODS, *supra* note 7, at 23.

22. See MAVEETY, *supra* note 7, at 14; Andrew Ferguson, *Trust Us*, WASHINGTONIAN, Feb. 1994. "Two things were clear to me from the onset," O'Connor has said about that period: [O]ne is, I wanted a family, and the second was that I wanted to work—and I love to work I was very fortunate in my life to have some opportunities to do work which was particularly interesting. I might not have felt the same way if the work hadn't been so interesting, but for me it always was.

* * *

. . . I think our children grew up expecting me to be working. Because I wasn't always available to them, they had to learn to manage some things on their own and to be a bit more independent than they might otherwise have been. I think in the long run that's an advantage.

Marie, *supra* note 9, at 45.

23. See MAVEETY, *supra* note 7, at 14; WOODS & WOODS, *supra* note 7, at 24-25; Cannon, *supra* note 8, at 56; Magnuson, *supra* note 8, at 17.

24. See MAVEETY, *supra* note 7, at 15; WOODS & WOODS, *supra* note 7, at 34-35; Cannon, *supra* note 8, at 56; Cook, *supra* note 13, at 239.

25. See WOODS & WOODS, *supra* note 7, at 40; Cannon, *supra* note 8, at 56.

26. See MAVEETY, *supra* note 7, at 15; Cook, *supra* note 13, at 239; Marie, *supra* note 9, at 46. As a trial judge, O'Connor had a reputation for toughness. She prepared thoroughly and

Seldom (at least in its modern history) has anyone risen so rapidly to the nation's highest court.

II. O'CONNOR'S OPINIONS: AN INTRODUCTION

Since joining the Court, Justice O'Connor has become a prolific opinion writer. Her interests are wide-ranging, including topics as diverse as federalism,²⁷ church-state relations,²⁸ and affirmative action.²⁹ In this Article, we make no attempt to assess Justice O'Connor's contributions to all of these

expected others to do the same. See *MAVEETY*, *supra* note 7, at 15; *WOODS & WOODS*, *supra* note 7, at 48-49; *Magnuson*, *supra* note 8, at 17. At least twice, colleagues recall, she advised defendants to obtain new counsel because their lawyers were unprepared. See *Magnuson*, *supra* note 8, at 17.

One anecdote from O'Connor's years as a trial judge seems particularly telling. A Scottsdale mother of two young children (ages three weeks and 16 months) pleaded guilty to passing bad checks totaling \$3500. She begged Judge O'Connor for mercy, claiming the children would become wards of the state if she went to prison because their father had abandoned the family. O'Connor sentenced the well-educated real estate agent to five to ten years in prison, saying "[s]omeone with all of your advantages should have known better." Returning to her chambers, Justice O'Connor burst into tears. See *WOODS & WOODS*, *supra* note 7, at 45-46; *Magnuson*, *supra* note 8, at 17-18.

Among those who brought O'Connor to President Reagan's attention were Justice William Rehnquist and Senator Barry Goldwater. See *WOODS & WOODS*, *supra* note 7, at 53; *Ferguson*, *supra* note 22; *Magnuson*, *supra* note 8, at 9-11. Before her nomination, Attorney General William French Smith, a former partner at the firm that had offered O'Connor a secretarial position 29 years earlier (Gibson, Dunn & Crutcher), sent his chief counselor, Kenneth Starr, to interview O'Connor. Reporting back, Starr cited her experience as a legislator, state government attorney and judge, noting that these experiences made her aware of the powers and limitations of each branch of government. She was seen as tough on law and order and reluctant to rule against police on technicalities. Smith liked her judicial inclination to defer to the legislative and executive branches. See *Magnuson*, *supra* note 8, at 10-12.

27. O'Connor's opinions have been notable for their emphasis on states' rights. See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 791-795 (1982) (O'Connor, J., concurring in part and dissenting in part).

28. O'Connor's Free-Exercise Clause jurisprudence is characterized by a careful balancing of state interests and individual religious claims. See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990); Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247 (1997). Although O'Connor may be more sensitive to religious exemption claims than certain other Justices, one could argue that her sensitivity does not extend to groups to which she does not belong. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

29. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See also *infra* notes 162-70 and accompanying text.

fields. Our goal is more limited: To consider that body of Justice O'Connor's work that addresses issues of particular importance to the lives of women qua women. We do not pretend to be exhaustive; our approach is neither mathematical nor statistical.³⁰ Rather, we review some of the Justice's key writings in the areas that we have identified to consider her approach to those subjects, to evaluate her analysis, and to raise questions about the significance of her presence on the Court. We hope to identify Justice O'Connor's particular contributions to women's issues, and to offer our observations about the impact of a judge's individual life experiences on her jurisprudence.³¹

III. O'CONNOR ON WOMEN'S SEXUALITY AND REPRODUCTIVE POTENTIAL

The so-called women's issue for which Justice O'Connor is best known is abortion. Indeed, her first decade on the Court was dominated to a large degree by the controversy surrounding *Roe v. Wade*.³² Although she noted her personal distaste for abortion during her confirmation process,³³ O'Connor was unwilling to promise to overrule *Roe*. Once on the Court, however, O'Connor's opposition to *Roe*'s doctrinal approach became clear. For example, dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc.*,³⁴ Justice O'Connor criticized *Roe*, arguing that it "cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests."³⁵ Nevertheless, O'Connor did not advocate abolishing all constitutional protections for abortion. Instead, she proposed a new standard: Whether regulations "throughout the entire pregnancy without reference to the particular 'stage' of pregnancy" are "unduly burdensome."³⁶

In fashioning this new test, O'Connor focused more on the nature of

30. Some commentators have attempted to analyze the impact of women judges statistically. See, e.g., Davis, *supra* note 1 (examining O'Connor's voting record on certain "liberal" issues, concluding that her decisions have little to do with her gender); Solimine & Wheatley, *supra* note 1.

31. Interestingly, in her own writings, O'Connor has challenged the notion that women adjudicate differently than men. She disputes gender generalizations such as "[w]omen attorneys are more concerned with public service or fostering community than with individual achievement. Women judges are more likely to emphasize context and deemphasize general principles. Women judges are more compassionate." O'Connor, *supra* note 1, at 1553. She has stated: "This 'New Feminism' is interesting, but troubling, precisely because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long." *Id.* In response to the question: "Do women judges decide cases differently by virtue of being women?," O'Connor offers the answer "a wise old man and a wise old woman reach the same conclusion." *Id.* at 1558.

32. 410 U.S. 113 (1973). See EDWARD LAZARUS, CLOSED CHAMBERS (1998).

33. See Linda Greenhouse, *Abortion Foes Assail Judge O'Connor*, N.Y. TIMES, Sept. 12, 1981, at 6.

34. 462 U.S. 416 (1983) (reaffirming the validity of *Roe v. Wade*, 410 U.S. 113 (1973)).

35. *Id.* at 454 (O'Connor, J., dissenting).

36. *Id.* at 453.

pregnancy and its medical implications than the abstract constitutional debates that had swirled around *Roe*. She chose not to examine the precise nature of substantive due process nor to consider whether judicial limitations on states' power to regulate reproductive rights were appropriate. Instead, O'Connor reflected upon the process of pregnancy and *Roe*'s trifurcation of that unitary process into artificially discrete categories.³⁷ She also suggested that new techniques in obstetrics and neonatal medicine had moved fetal viability to an earlier stage of pregnancy,³⁸ making *Roe*'s original reliance upon viability in the third trimester obsolete.³⁹

In many ways O'Connor's opinion in *Akron* exemplified a classic "feminist" analysis.⁴⁰ It was highly contextual and fact driven, lacking overarching analytic abstractions.⁴¹ Moreover, the facts O'Connor looked to were more physiological than social. In a sense, the opinion looked inward. Her discussion of pregnancy and fetal development drew upon the perspective of a woman who had born a child. At the same time, however, O'Connor's analysis forswore other equally contextual, equally feminist considerations.⁴² While she considered the biology of pregnancy, she did not reflect on its economic or social implications. The impact of her proffered abandonment of the trimester doctrine on the lives of women with unwanted or dangerous pregnancies did not seem to interest her.

O'Connor's opinion in *Akron* led many to believe that she would ultimately vote to reject *Roe* completely.⁴³ However joining Justices Souter and Kennedy in *Planned Parenthood v. Casey*,⁴⁴ O'Connor took an approach that would characterize much of her judicial style. Rather than clearly overruling *Roe*, she worked to form a centrist consensus that eschewed both the status quo and the rescission of the right to abortion. Along with Kennedy and Souter, O'Connor drafted a "joint opinion" that claimed to preserve *Roe*'s "core" while undermining much of its detail.⁴⁵ This cautious reluctance to rule broadly or to

37. *Id.* at 454.

38. *Id.* at 457-58. This is medically debatable. See LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 220-23 (1990).

39. *Akron*, 462 U.S. at 458-59.

40. Feminist analysis has frequently been described as contextual. See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Behuniak-Long, *supra* note 1; Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573 (1987). O'Connor herself has criticized the contention that an emphasis on context is a gender attribute. O'Connor, *supra* note 1, at 1553, 1557.

41. Ironically, O'Connor's approach could be characterized as post-modernist, in that it rejects universality and the validity of grand theories. See Charles Jencks, *The Post Modern Agenda*, in THE POST-MODERN READER 10-39 (Charles Jencks ed., 1992).

42. *Akron*, 462 U.S. at 466-67, 473-74.

43. See Robert J. Giuffra, Jr., *The Rehnquist Court After Five Terms*, N.Y. L.J., July 30, 1991, at 1; *Roe v. Wade: The Court Decision at the Center of the Abortion Furor*, SEATTLE TIMES, Jan. 22, 1985, at A3.

44. 505 U.S. 833 (1992).

45. *Id.* at 846.

adhere to an absolutist position caused her fellow conservative, Antonin Scalia, to castigate the joint opinion as having "no principled or coherent legal basis."⁴⁶

Perhaps equally telling are the internal inconsistencies in the joint opinion's approach to particular parts of the Pennsylvania abortion law before the Court. For example, in reviewing the spousal consent requirement, Justice O'Connor was able to appreciate the indignity of being forced to ask one's husband for permission to have an abortion.⁴⁷ Indeed, the joint opinion's sensitivity to the possibility that women needing abortions may be threatened with physical and psychological violence is quite remarkable. After a lengthy review of the prevalence and potency of family violence, the joint opinion concluded: "We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."⁴⁸

At the same time, however, the joint opinion seemed blind to other social phenomena, such as child abuse and economic hardship, that could interact with the state's regulations to create equally insurmountable burdens upon a women's choice. Most telling was the opinion's consideration of Pennsylvania's twenty-four hour waiting rule, a type of regulation previously held unconstitutional in *Akron*. Seemingly oblivious to the very principle of *stare decisis* they had celebrated in discussing the "core" of *Roe*,⁴⁹ on this issue the joint opinion overruled *Akron* with barely a nod to the importance of precedent.⁵⁰ In so doing, the joint opinion also summarily dismissed facts found by the lower court demonstrating that the twenty-four hour waiting period created an undue burden for poor women.⁵¹

The stark contrasts in the opinion's approach to various provisions of the Pennsylvania law suggest the limits of contextualism. Some facts appear more relevant than others.⁵² Perhaps not surprisingly, the data that resonated with the

46. *Id.* at 987 (Scalia, J., dissenting in part and concurring in part). Despite Scalia's criticism, the effect of the joint opinion was largely to overrule *Roe*. The changes dictated by the joint opinion's approach critically undermined the right protected in *Roe*, which was left far more insecure and difficult to vindicate after *Casey*. See, e.g., Agota Peterfy, Comment, *Fetal Viability as a Threshold to Personhood*, 16 J. LEG. MED. 607, 613-14 (1995).

47. *Casey*, 505 U.S. at 887-99 (O'Connor, Souter & Kennedy, JJ.).

48. *Id.* at 894.

49. *Id.* at 846.

50. *Id.* at 884-85.

51. *Id.* at 885-86. See also *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1351-52 (E.D. Pa. 1990) (noting that the 24-hour waiting period required women to "make a minimum of two visits to an abortion provider," which might include double travel time, an overnight stay, or increased costs).

52. As Professor Sylvia Law put it: The opinion's approach "hits hardest those women who are most vulnerable, i.e. the poor, the unsophisticated, the young, and women who live in rural areas." Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 931.

authors was that which was closest to their own experiences. While the point is unprovable, it seems quite likely that Justice O'Connor, an upper middle class, highly educated, married woman who had experienced gender discrimination, could appreciate the indignity of having to ask her husband for permission to have an abortion. She could much less readily understand the problems poor women face when they must take two days off from work to undergo the procedure.⁵³

O'Connor's opinion in *Bray v. Alexandria Women's Health Clinic*⁵⁴ is less well-known, but echoes similar themes. In *Bray* the issue was whether 42 U.S.C. § 1985(3)⁵⁵ could be used against persons obstructing access to abortion clinics. According to the majority, the answer to that question turned in part upon whether § 1985 protected gender-based conduct.⁵⁶ In a complex and lengthy opinion, Justice Scalia found that it could not and denied relief.⁵⁷

In a dissent joined by Justice Blackmun (with whom she had disagreed strongly in *Casey*),⁵⁸ Justice O'Connor concluded that women are a protected class under § 1985 and, further, that "their ability to become pregnant . . . and their ability to terminate their pregnancies [are] characteristics unique to the class of women."⁵⁹ Coming to the issue from the inescapable reality of pregnancy, rather than the abstractions of deductive reasoning, Justice O'Connor found it absurd to conclude that conspiracies to deny access to abortion clinics had

53. Justice O'Connor also failed to recognize the economic consequences of pregnancy in *Wimberly v. Labor & Industrial Relations Commission*, 479 U.S. 511 (1987). *Wimberly* involved a Missouri statute that denied unemployment compensation to those who left work "voluntarily." The question before the Court was whether the state statute conflicted with a federal statute barring the denial of compensation "solely" because of pregnancy. Characterizing the Missouri law as "neutral," O'Connor held that its disqualification of pregnant applicants was only incidental. *Id.* at 517. For a full treatment of *Wimberly*, see Brown et al., *supra* note 40, at 601-04; but see *infra* note 62.

54. 506 U.S. 263 (1993).

55. 42 U.S.C. § 1985(3) (1994) (imposing liability on those who conspire to deprive a person of "having and exercising any right or privilege of a citizen of the United States").

56. *Bray*, 506 U.S. at 269-74.

57. *Id.* at 274. For lengthier analyses of *Bray*, see Lisa J. Banks, Comment, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449 (1993); Sherri Snelson Haring, Note, *Bray v. Alexandria Women's Health Clinic: "Rational Objects of Disfavor" as a New Weapon in Modern Civil Rights Litigation*, 72 N.C. L. REV. 764 (1994). See also Tracey E. Higgins, "By Reason of Their Sex:" *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1555-60 (1995) (analyzing the selective and inconsistent use of the sex of the parties).

58. Compare *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (O'Connor, Souter & Kennedy, JJ.), with *id.* at 922-44 (Blackmun, J., dissenting in part and concurring in part) (arguing that the Court should apply strict scrutiny and maintain the trimester framework and that the informed consent provision, the 24-hour waiting period, parental consent, and the reporting provisions were unconstitutional).

59. *Bray*, 506 U.S. at 350 (O'Connor, J., dissenting).

nothing to do with gender. As a woman who had been pregnant and had seen pregnancy affect her career, Justice O'Connor could understand, as Justice Scalia could not, that actions aimed at limiting abortions are aimed at women *qua* women.⁶⁰

In order to conclude that § 1985 was applicable in *Bray*, Justice O'Connor had to see beyond gender discrimination. She had to appreciate the ways in which the activities of abortion protesters limited women's ability to exercise reproductive choices. A comparison with the joint opinion in *Casey* is revealing. In *Casey*, O'Connor did not view the state's imposition of a twenty-four hour waiting period as unduly burdensome, although that requirement might well increase women's exposure to abortion protesters.⁶¹ In *Bray*, by contrast, O'Connor focused on the threatening behavior of the demonstrators. Although protesting abortion is legitimate, O'Connor likened the protesters' activities to "mob violence," unworthy of legal sanction.⁶² She could see the particular vulnerability of any woman, no matter her class or station in life, to the vitriol of the clinic protesters. She could not, however, appreciate the burdens experienced by women in economic distress who are forced to wait and to travel long distances for their health care.⁶³

A similar pattern emerges in other cases that deal with women's sexuality and reproductive potential. For example, in *Bragdon v. Abbott*,⁶⁴ Justice O'Connor dissented from the majority's conclusion that a woman who is infected with HIV has a disability within the meaning of the Americans with Disabilities Act ("ADA")⁶⁵ because the virus substantially limits her in the major life activity of reproduction. In a brief opinion, O'Connor questioned whether reproduction is properly considered a major life activity. "In my view," she wrote, "the act of

60. Rejecting the argument that animus against women seeking abortions was gendered animus or animus against women as a class, Justice Scalia relied on the holding in *Geduldig v. Aiello*, 417 U.S. 484, 494-96, 497 n.20 (1974). That case held that health insurance coverage that excluded the "disability" of pregnancy was not gender based but, rather, distinguished between pregnant and non-pregnant people. Similarly, Justice Scalia argued in *Bray* "the disfavoring of abortion . . . is not ipso facto sex discrimination." *Bray*, 506 U.S. at 273.

61. *Casey*, 505 U.S. at 886-87.

62. *Bray*, 506 U.S. at 349.

63. At first glance, O'Connor's dissent in *Rust v. Sullivan*, 500 U.S. 173, 223 (1991) (O'Connor, J., dissenting), might seem to evidence an appreciation for the economic hurdles facing poor women who are dependent on government subsidized family planning clinics. At issue in *Rust* was a regulation barring the clinic staff from discussing abortion with clients. But Justice O'Connor's dissent is in fact entirely characteristic. Nowhere does she consider the plight of the clinic patients. Rather, she is troubled by the potential First Amendment problems posed by the regulation's limit on the speech of health care providers. *Id.* at 223-34. Even so, Justice O'Connor refused to join Justice Blackmun's dissent insofar as he found the regulation substantively unconstitutional. Instead, O'Connor found the regulation was not authorized by the governing statute, again avoiding the difficult constitutional issue presented. *Id.*

64. 118 S. Ct. 2196 (1998).

65. 42 U.S.C. §§ 12101-188 (1994 & Supp. I 1995 & Supp. II 1996).

giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons—'caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working'—listed in [the ADA regulations.]”⁶⁶ From a Justice who recognized the importance of pregnancy in *Casey* and the relationship between pregnancy and gender discrimination in *Bray*, that is a remarkable statement. Perhaps, however, it is not altogether surprising when one contrasts the different posture of the abortion cases and *Abbott*. In *Casey* and *Bray*, O'Connor considered the plight of women who seek to control their reproduction and, therefore, free themselves from what early feminists termed “biological tyranny.”⁶⁷ To a successful career woman like O'Connor, the importance of reproductive controls might be self-evident. In *Abbott*, by contrast, the plaintiff was not seeking control over her biology in order to function in the workplace just like any career man. Instead, she was arguing that HIV had deprived her of the experience of giving birth. This experience, according to O'Connor, was simply less “major” than the experience of going to work every day. The fact that *Abbott* had HIV, a stigmatized, sexually transmitted disease, undoubtedly made her even less sympathetic in O'Connor's eyes.⁶⁸ Like the poor women in *Casey*, *Abbott* faced barriers outside the realm of O'Connor's experiential understanding.

O'Connor is clearly quite engaged with issues of reproduction and sexuality. She writes often, commonly crafting separate dissents and concurrences when she is not authoring the main text. Almost uniformly, her approach is contextual and incremental. The only “doctrine” she has formulated is the highly particularistic, almost non-doctrine, of *Casey*. Unlike many of her colleagues, O'Connor avoids general rules and grand theories. Indeed, although she celebrated *stare decisis* in *Casey*, O'Connor's opinions rely more on her perception of the facts than on a parsing of prior cases.⁶⁹

In many ways, O'Connor's contextualization epitomizes the feminist legal

66. *Abbott*, 118 S. Ct. at 2217 (O'Connor, J., dissenting).

67. LYNDIA BIRKE, *WOMEN, FEMINISM AND BIOLOGY: THE FEMINIST CHALLENGE* (1986); De Beauvoir, *supra* note 4, at 3-60.

68. This is not the only opinion that evidences O'Connor's moral distaste for the parties. For example, although she issued a separate opinion divorcing herself from Justice Scalia's insistence that only those interests that have historically been recognized are entitled to due process protection, Justice O'Connor did not object to Scalia's snide condemnation of the “unconventional lifestyle” of the parties in *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). Likewise, O'Connor joined the majority's highly moralistic opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Michael H.* and *Bowers*, like *Abbott*, are not about control of reproduction but rather about the right to exercise one's sexuality or reproductive potential.

69. Indeed, in *Bray*, O'Connor explicitly condemned the parsing process. Turning to the precedent being examined in *Bray* she remarked: “I would not parse *Griffin* so finely . . .” *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 347 (O'Connor, J., dissenting) (citations omitted). For a discussion of the complexities of precedent-based arguments, see JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* 153-83 (1994).

inquiry.⁷⁰ But the context she invariably and almost unwittingly relies upon bears a striking resemblance to the experiences and circumstances of an upper middle class, married, white woman who has managed to combine family with a brilliantly successful career.⁷¹ The experiences of poor women, those who cannot bear children, or those who cannot manage "to have it all," seem distant and largely irrelevant to her decision-making process.

IV. JUSTICE O'CONNOR AND CHILDREN

Sandra Day O'Connor is not only the first woman on the Court, she is the first mother. In a sense this is not surprising: Some 82.5% of U.S. women become mothers in their lifetimes.⁷² In our culture, women are the primary nurturers and caretakers, largely responsible for children, the elderly, and the infirm.⁷³ Indeed, Justice O'Connor's own life has reflected this pattern. After the birth of her second child, it was she, not her husband, who interrupted a legal career and spent five years out of the paid workforce.⁷⁴

For most women, motherhood is a defining experience⁷⁵ that intensifies their perceptions of children and childhood. As the first mother on the Supreme Court, Justice O'Connor might have been expected to show a heightened interest in and concern for children and those who depend upon the care of others. To some extent, she has. But despite O'Connor's considerable enthusiasm for cases involving children, people with disabilities, and others who are to some degree dependent, her treatment of children is complex and seemingly inconsistent. At times her response to children is warm and engaged, but at other times she has been cool and indifferent. Justice O'Connor's opinions in *Casey*⁷⁶ and in *Hodgson v. Minnesota*,⁷⁷ two cases about minors' access to abortion, illustrate some of the paradoxes.

The statutes challenged in *Casey* and *Hodgson* both placed additional burdens on a woman seeking an abortion if she happened to be a minor. Each statute required that the minor notify her parent(s) of her intent to undergo an

70. See Jencks, *supra* note 41.

71. With her appointment to the Supreme Court, O'Connor became not only the first woman on the Court, but also the second wealthiest justice. See WOODS & WOODS, *supra* note 7, at 14-15.

72. See Amara Bachu, *Fertility of American Women*, in UNITED STATES BUREAU OF THE CENSUS REPORT (June 1995). In another sense, however, it is most surprising. Even today, in the upper echelons of economically successful women, a disproportionate number are childless. U.S. BUREAU OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 81, tbl. 103 (117th ed. 1997). This was more likely to be the case with women of Justice O'Connor's generation.

73. See ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* 271-78 (1989).

74. See WOODS & WOODS, *supra* note 7, at 23.

75. See SHEILA KITZINGER, *OURSELVES AS MOTHERS: THE UNIVERSAL EXPERIENCE OF MOTHERHOOD* (1995).

76. 505 U.S. 833 (1992).

77. 497 U.S. 417, 458 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part).

abortion procedure.⁷⁸ The Minnesota statute in *Hodgson* required that *both* parents be notified of their daughter's decision while the Pennsylvania statute challenged in *Casey* allowed the abortion to proceed if one parent consented. Justice O'Connor voted to strike down the two-parent rule of *Hodgson* while upholding the parental consent requirement of *Casey*.⁷⁹

These positions seem paradoxical because, from the perspective of the young woman seeking an abortion, it is the mandatory participation of a parent—not the number of parents participating—that is the problem. But Justice O'Connor does not focus on the minor. In both cases, her gaze is firmly directed elsewhere, to an entity she sometimes fails to name but frequently defends—the family.⁸⁰ What is strikingly different about *Hodgson* and *Casey* is the family Justice O'Connor envisions for the young women involved.

In *Casey*, it is very clear that O'Connor views the parental consent requirement as a medium for delivering a troubled girl into the arms of her waiting family. She writes: "[M]inors will benefit from consultation with their parents and . . . children will often not realize that their parents have their best interests at heart."⁸¹ The image is of comfort, care, and support. This is in sharp contrast to the violent and dangerous family vividly depicted in O'Connor's discussion of the spousal notification provisions of the same Pennsylvania statute. There, spousal notification does not deliver a woman to loving arms. Instead, it threatens her with serious harm.⁸²

O'Connor's inconsistent treatment of adult women and minors in *Casey* is jarring.⁸³ So too is her seemingly inconsistent treatment of the minors seeking abortions in *Casey* and *Hodgson*. But the paradox resolves itself if the underlying image of family can be surfaced. In criticizing the two-parent notification requirement of *Hodgson*, Justice O'Connor notes the unrealistic vision of family in the Minnesota statute. Only half of teenagers, she writes, reside in a household with both of their biological parents.⁸⁴ Most striking in *Hodgson*, although not in *Casey*, is Justice O'Connor's fear that a parent may have abused his child or may pose a threat to her safety. Indeed, O'Connor is sharply critical of the statute in *Hodgson* for its response to the possibility that the pregnant minor may have been abused.⁸⁵ If the minor claims she has been

78. Both statutes also allowed the minor to argue to a judge that she was sufficiently mature to make the abortion decision without her parents' participation. See *Casey*, 505 U.S. at 844, 899 (explaining the statutory "judicial bypass" procedures); *Hodgson*, 497 U.S. at 426. This "judicial bypass" process is, however, not relevant to the present discussion.

79. Compare *Hodgson*, 497 U.S. at 424-26, with *Casey*, 505 U.S. at 899.

80. See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

81. *Casey*, 505 U.S. at 895.

82. See *id.*

83. As O'Connor says in *Casey*: "We cannot adopt a parallel assumption about adult women." *Id.*

84. *Hodgson*, 497 U.S. at 460.

85. *Id.*

abused, the parental notification requirement in the abortion statute can be waived. However, the parent must be notified that the child has made the claim of abuse! In short, under the statute, avoiding notification will result in notification.⁸⁶

In the minors' abortion cases the wishes of children and the interests of their parents arguably collide. In *Hodgson*, O'Connor saw this potential clash and protected the minor, while in *Casey*, unpersuaded that a conflict existed, O'Connor chose the family. In so doing, she echoed the position she had taken just one year prior to *Hodgson*, when she joined Justice Scalia's controversial opinion in *Michael H. v. Gerald D.*⁸⁷ In that case, the Court upheld a California statute that barred absolutely a man's claim that he was the father of a child born to a married woman. Neither the mother nor her husband chose to contest the child's paternity, and under California law that ended the matter. Rejecting both the man's assertion of paternity and claims made on behalf of the child, the plurality concluded that Michael H. and the child he said was his had no liberty interest in a relationship with each other.⁸⁸ O'Connor wrote a brief concurrence, rejecting the plurality's holding that only "'interest[s] that historically [have] received . . . attention and protection'"⁸⁹ fall within the Due Process Clause. However, she expressed no discomfort with the plurality's decision that California may protect the integrity of a marital family by completely foreclosing the claims of a putative father. For O'Connor as well as Scalia, the child's interests were identical to those of her mother and her mother's husband.⁹⁰

But focus on family cannot and does not explain all of Justice O'Connor's rulings in cases involving children. The abortion cases and *Michael H.* present scenarios where it is either acknowledged or arguable that child and parent have competing interests. Many other cases, however, do not place parent and child in opposition. Although the Justice herself has eschewed any search for a Grand Unified Theory,⁹¹ a recurring theme illuminates O'Connor's view of children: autonomy. Indeed, this is a concept central to all of O'Connor's jurisprudence. Both Justice O'Connor's strongly pro-child opinion in *Vernonia School District v. Acton*⁹² and her seeming callousness in upholding the Immigration and

86. For a further discussion of abused children and their duty to give notice of their abuse, see *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). See also *infra* notes 115-22 and accompanying text.

87. 491 U.S. 110 (1989). See also Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 624-42 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-98 (1990).

88. *Michael H.*, 491 U.S. at 131.

89. *Id.* at 127 n.6 (quoting *id.* at 139 (Brennan, J., dissenting)).

90. The dissent in *Michael H.* clearly felt that the child's interests were aligned with those of the putative father rather than with those of the mother's husband. *Id.* at 143-47 (Brennan, J., dissenting).

91. See *Board of Educ. v. Grumet*, 512 U.S. 687, 718 (1994).

92. 515 U.S. 646 (1995).

Naturalization Service's right to detain children in *Reno v. Flores*⁹³ demonstrate that it is children's autonomy, not their humanity, that sparks Justice O'Connor's interest.

Vernonia challenged a school district policy that required drug testing as a condition of participation in interscholastic sports. Students who wished to play a sport had to consent to drug testing and obtain the written consent of their parents as well.⁹⁴ Each athlete was tested at the beginning of the season for her sport. In addition, each week, all the athletes' names were placed in a "pool." Ten percent of the names in the pool were drawn at random and those students were required to undergo additional testing.⁹⁵ The Court upheld the school district's rule, but Justice O'Connor authored a scathing dissent.

Writing for the majority, Justice Scalia described the students in the *Vernonia* public schools as having been "committed to the temporary custody of the State as schoolmaster."⁹⁶ He noted that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will."⁹⁷

Justice O'Connor disagreed with a passion and vehemence missing from many of her opinions. She began by noting that among the eighteen million students in American public schools are millions of schoolboy and schoolgirl athletes, "an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school."⁹⁸ Yet, as a result of the majority's opinion, these youngsters "are open to an intrusive bodily search."⁹⁹ O'Connor's identification with and empathy for the "good kids" who are being subjected to embarrassing urine screenings as a condition of playing a school sport is palpable. She viewed the petitioner's demand as a simple request to be treated with dignity. Toward the end of her dissent, O'Connor shifts her focus from the Fourth Amendment's prohibition of suspicionless searches to the rights of schoolchildren. Schools, she admits, "have substantial constitutional leeway in carrying out their traditional mission of responding to particularized wrongdoing."¹⁰⁰ However, "blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise."¹⁰¹

O'Connor's opinion is striking both for its animation and for her intense affinity with the students who, in her view, were subjected to humiliation and

93. 507 U.S. 292 (1993).

94. See *Vernonia*, 515 U.S. at 650.

95. See *id.*

96. *Id.* at 654.

97. *Id.*

98. *Id.* at 667 (O'Connor, J., dissenting).

99. *Id.*

100. *Id.* at 682 (citation omitted).

101. *Id.*

intrusion solely because they are students. O'Connor ignored the fact that persuaded her sister on the bench, Justice Ginsburg, to vote with the majority: Drug testing applies only to those students who voluntarily opt to participate in interscholastic athletics. Instead, O'Connor viewed the case as an assault on the integrity of young people, and she defended their autonomy quite fiercely.

Vernonia is in sharp contrast to the position Justice O'Connor took just two years earlier in another case involving a large group of young people—juveniles detained by the Immigration and Naturalization Service (“INS”) pending deportation hearings. The issue in *Reno v. Flores*¹⁰² was whether the INS could hold children suspected of being in the United States illegally (but not suspected of a crime) in a detention facility when there was a responsible adult willing to assume the child's care pending the deportation hearing. As in *Vernonia*, the majority opinion in *Flores* was written by Justice Scalia. In his hands, the issue took on a rather odd cast, becoming “the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.”¹⁰³ Dissenting, Justice Stevens offered a somewhat different definition: “The right at stake in this case is not the right of detained juveniles to be released to one particular custodian rather than another, but the right not to be detained in the first place.”¹⁰⁴

Staking out a position in the middle, Justice O'Connor rejected Scalia's assertion that “‘juveniles, unlike adults, are always in some form of custody.’”¹⁰⁵ Instead, she argued that “[c]hildren, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional ‘[f]reedom from bodily restraint’ is no narrower than an adult's. . . . [W]e consistently have rejected the assertion that ‘a child, unlike an adult, has a right not to liberty but to custody.’”¹⁰⁶

Justice O'Connor admitted that children have far less autonomy in their personal decision-making than adults. However, this did not push her into

102. 507 U.S. 292 (1993).

103. *Id.* at 302.

104. *Id.* at 341 (Stevens, J., dissenting). Justice Scalia's elaborate and narrow definition of the right asserted is reminiscent of his reasoning in *Michael H.*, where he defined the plaintiff's claim as the right “of an adulterous natural father” to a relationship with his child. *Michael H. v. Gerald D.*, 491 U.S. 110, 126-27 & n.6, 130 n.7 (1989).

105. *Flores*, 507 U.S. at 302 (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)). Scalia went on to assert that because children are always in custody, “where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.” *Id.* at 303. He made it quite clear that the conditions of the child's confinement need only meet “[m]inimum standards.” *Id.* at 304. “[T]o give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention is a policy judgment rather than a constitutional imperative.” *Id.* at 305.

106. *Id.* at 316 (O'Connor, J., concurring) (quoting *In re Gault*, 387 U.S. 1, 17 (1967)).

Justice Scalia's camp. It does not mean that for children any form of custody, so long as it meets "minimum standards,"¹⁰⁷ is constitutionally permissible. Instead, as Justice O'Connor explained: "[I]n our society, children normally grow up in families, not in governmental institutions."¹⁰⁸ It is the *institutionalization*, not the custody, to which O'Connor objects.¹⁰⁹

However, having restored the children in *Flores* to their full status, O'Connor proceeded to concur in their continued detention. Unlike the dissenters, who focused on the special needs and vulnerabilities of children,¹¹⁰ O'Connor treated the children in *Flores* as she did those in *Vernonia*, i.e., like similarly situated adults. Unfortunately for the children in *Flores*, this meant treatment as aliens—a class whose rights have traditionally received only limited constitutional protection.¹¹¹

In his seminal work *Centuries of Childhood*, Philippe Ariès, the father of family history, argued that one does not need official records to piece together a history of childhood.¹¹² Perceptions of children are all around us. One of Ariès's favorite sources was painting, because children were frequently the subjects. It was Ariès who first commented on the Medieval tradition of painting children as miniature adults.¹¹³ How could it be, he asked, that the greatest painters in human history painted children with adult proportions? Obviously, the great painters of the Medieval period did not lack skill in depicting the human form. What they lacked was a vision of childhood. Those artists merely documented a culture in which there was no sense that a child was anything other than a small adult. Notions of a timetable for human development, particularly psychological development, are creatures of a much later era.¹¹⁴

It is perhaps simplistic, but also revealing to suggest that like a Medieval

107. *Id.* at 305.

108. *Id.* at 318 (O'Connor, J., concurring).

109. *Id.*

110. Interestingly, the dissent's analogies were not to other INS rules, but to other rules affecting children, most particularly the Justice Department's "Standards for the Administration of Juvenile Justice." These standards require that strenuous efforts be made to locate an appropriate adult to take custody of a juvenile offender so that he or she may be released from detention. *See id.* at 332 nn.19-20 (Stevens, Blackmun, JJ., dissenting).

111. *See, e.g.,* *Sugarman v. Dougall*, 413 U.S. 634 (1973) (suggesting alienage is a suspect class); *compare Plyler v. Doe*, 457 U.S. 202 (1982) (applying somewhat heightened scrutiny for undocumented alien children denied access to public schools).

112. PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 33-34 (1962).

113. *Id.*

114. Developmental psychology, so much a part of the legal treatment of children today, would not become a distinct field until Piaget's work was published in the early Twentieth Century. JEAN PIAGET, *THE CHILD'S CONCEPTION OF PHYSICAL CAUSALITY* (Margorie Gabain trans., 1966). *See also* *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1438-39 n.12 (5th Cir. 1983) (Politz, C.J., dissenting); *State v. Wright*, 775 P.2d 1224, 1227 (Idaho 1989); *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 641 N.E.2d 1228, 1233-34 (Ill. App. Ct. 1994).

painter, O'Connor paints children as miniature adults. Unlike some of her colleagues, she refuses to disenfranchise, dismiss, or burden children simply because they are children. She sees them as worthy and deserving—but not as *specially* deserving. It is their autonomy she champions, not their vulnerability. So, O'Connor insists that children incarcerated by the INS be treated no worse than adults incarcerated by the INS, but she will not join the *Flores* dissent to argue that because they are children, the petitioners in *Flores* in fact need different treatment. O'Connor would not allow schools to engage in blanket drug testing of athletes, but she would also not exempt children from the death penalty.¹¹⁵

O'Connor's recent disquisition on sexual harassment in the schools is the latest example of her complex view of children and the law. *Gebser v. Lago Vista Independent School District*¹¹⁶ considered the liability of a school district for a teacher's sexual harassment of a student. The tone of O'Connor's opinion bespeaks sympathy, not disdain. However, while recognizing that a school may sometimes be liable for a teacher's misconduct, O'Connor was unwilling to read Title IX¹¹⁷ as imposing respondeat superior liability.¹¹⁸ Instead, she held that a Title IX plaintiff must demonstrate that a school had actual knowledge of misconduct and responded with deliberate indifference.¹¹⁹ Justice O'Connor seemed concerned that Ms. Gebser had not followed the school's established procedures for vindicating her rights. Had Ms. Gebser been as self-sufficient and competent as the young Sandra Day undoubtedly was, she could have reported her teacher's conduct up the chain of command.¹²⁰ Then, if those in authority knew of the teacher's conduct and failed to act, Ms. Gebser might have had a Title IX remedy.¹²¹ But Ms. Gebser did not report the teacher and Justice

115. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J. concurring). In *Thompson*, O'Connor, in characteristic fashion, attempted a compromise, stating that age is an appropriate mitigating factor in capital sentencing. See also *Johnson v. Texas*, 509 U.S. 350, 376 (1993) (O'Connor, J., dissenting) ("The vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime.").

116. 118 S. Ct. 1989 (1998).

117. 20 U.S.C. §§ 1681-88 (1994 & Supp. I 1995 & Supp. II 1996).

118. *Gebser*, 118 S. Ct. at 1999.

119. *Id.* Cf. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) (where O'Connor joined the majority in instructing lower courts on how to proceed in assessing an employer's vicarious liability for sexual harassment by employees).

120. That an eighth grader may not have felt sufficiently empowered to notify authorities does not seem to have entered into the Justice's thinking. Nor does she focus on the portion of the record where Ms. Gebser states that her teacher was "the person in Lago administration . . . who I most trusted. . . ." *Gebser*, 118 S. Ct. at 2004 n.10 (citation omitted). To Ms. Gebser, her teacher *was* the administration. He was the chain of command to whom her grievance might be reported. O'Connor fails to consider that an adolescent facing seduction and rape by a teacher might see the world in a very different way than an adult.

121. See *id.* at 1997.

O'Connor concluded that her hands were tied until Congress explicitly created a remedy.¹²²

V. O'CONNOR ON DEATH AND DYING

In the 1980s Justice O'Connor had a very personal reason to contemplate mortality. Between 1984 and 1989 she buried both of her parents.¹²³ In 1988, she was diagnosed with breast cancer and treated with a mastectomy and chemotherapy.¹²⁴ Throughout this period, she displayed a remarkable, but for her characteristic, stoicism, scheduling her chemotherapy sessions on Fridays so that the unpleasant side-effects would not keep her from work.¹²⁵

Just two years after these experiences, the Supreme Court decided its first case addressing the rights of the dying. In *Cruzan v. Director, Missouri Department of Health*,¹²⁶ the Supreme Court reviewed the constitutionality of Missouri's requirement of clear and convincing evidence of an incompetent individual's wish to terminate life support. Justice Rehnquist wrote the majority opinion, holding that the Constitution did not impose any particular standard of proof upon a state in determining an incompetent individual's prior intentions.¹²⁷ In a separate concurrence, O'Connor asserted that the Constitution allows competent individuals to have their wishes respected if they become incompetent.¹²⁸ In characteristic fashion, O'Connor focused less on the abstract constitutional issues, like the nature and source of a constitutional right to die, and more on the practical implications of end-of-life decision-making. As in the abortion cases, O'Connor emphasized the biological and medical realities of the

122. O'Connor's choice of language suggests that she believes the sexual "relationship" was not altogether unwelcome. *Id.* at 1993. "Gebser did not report the relationship to school officials, testifying that while she realized [the teacher's] conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher." *Id.* O'Connor seems to miss the point that sexual contact between adults and children is criminalized not to prevent forcible contact, which is already criminal, but to outlaw and punish just this sort of seduction of a lonely and confused adolescent.

123. O'Connor's father, Henry "Harry" Alfred Day died at the age of 86 on April 9, 1984. See John McPeck, *Deaths*, SAN DIEGO UNION-TRIB., April 12, 1984 at A2. O'Connor's mother, Ada Mae Day, died on March 3, 1989 at the age of 85. See *Ada M. Day, Mother of Justice*, ARIZ. REPUBLIC, Mar. 5, 1989.

124. Released from the hospital five days after the surgery, see *Justice O'Connor Goes Home*, N.Y. TIMES, Oct. 27, 1988, at A16, O'Connor described the chemotherapy as "lousy." *Justice O'Connor Says Work, Resiliency Aided Cancer Fight*, ST. LOUIS POST-DISPATCH, Nov. 5, 1994, at 2A.

125. See Cannon, *supra* note 8, at 56. As Justice Harry Blackmun observed, "Sandra's tough." *Id.*

126. 497 U.S. 261 (1990).

127. *Id.* at 286.

128. *Id.* at 287-92 (O'Connor, J., concurring).

situation before her.¹²⁹

Much of O'Connor's discussion in *Cruzan* was about how individuals can and ought to plan their own ends. O'Connor commended the "practical wisdom" of state laws that enabled individuals to appoint surrogate medical decision-makers.¹³⁰ Her ideal is the individual who, fearing a painful and undignified death, has the foresight and competence to execute the appropriate legal documents. While states can function as a "laboratory,"¹³¹ experimenting with various ways to regulate end-of-life decision-making, in O'Connor's world, the Constitution demands that the state allow the individual some leeway in planning for her end. This opinion reflects an almost *Lochnerian*¹³² concern for autonomy, here applied to questions of mortality rather than questions of the market. Unfortunately, Nancy Cruzan lacked the legal sophistication (not to mention the funds) to have all her documents in order. She had left no written direction before her tragic accident.¹³³ Thus, O'Connor agreed with Justice Rehnquist that the state could impose hydration and feeding over the opposition of Ms. Cruzan's family.

O'Connor's support for a dignified death was further articulated in two cases that came before the Court in 1997: *Washington v. Glucksberg*¹³⁴ and *Vacco v. Quill*.¹³⁵ Each addressed the constitutionality of a state ban on physician-assisted suicide. In both cases, a unanimous Court upheld the state law.

O'Connor's concurrence in *Glucksberg* emphasized the painful realities of the dying process: "Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies

129. *Id.* at 287-89.

130. *Id.* at 290.

131. *Id.* at 292 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). See also *supra* note 27 and accompanying text (reflecting O'Connor's state-centered federalism).

132. *Lochner v. New York*, 198 U.S. 45 (1905) (rejecting protective labor legislation as unconstitutional interference with workers' freedom of contract). Criticizing *Lochner* in his famous dissent, Justice Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. . . . The [Fourteenth] Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.

Id. at 75 (Holmes, J., dissenting).

133. See *Cruzan*, 497 U.S. at 268-69. Cf. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (concerning the family of a disabled child that pulled the child from the public school, appealed the school's determination that a private placement was unnecessary, and paid for private education in the interim; O'Connor held that the school board must compensate the parents for the costs of the private education). Left unanswered by O'Connor's opinion in *Carter* is the fate of a child whose family lacks the resources to pay for the private education *pendente lite*.

134. 521 U.S. 702 (1997).

135. 521 U.S. 793 (1997).

physical deterioration and a loss of control of basic bodily and mental functions."¹³⁶

Despite this poignant recognition of human suffering (especially the suffering that accompanies an individual's loss of agency), O'Connor was willing to accept the majority's decision denying a constitutional right to assisted suicide because the states did not prohibit individuals from obtaining sufficient medication to alleviate their suffering, even if the medication would hasten death.¹³⁷ Thus, rather than decide the abstract and absolute question of a constitutional right to assisted suicide, O'Connor narrowed the question—and thereby avoided it.¹³⁸

O'Connor's opinions in these cases demonstrate her intense interest in the predicaments of those who through no fault of their own have lost the good health and fortune to which they had been accustomed. She seems less concerned, however, with the fate of those who were born with their predicament, or who can be deemed responsible for what befell them.¹³⁹

Once again, O'Connor relies upon a contextualized approach, but one limited by her own life experiences. At times she is deeply empathetic, seeming to embody the feminist ideal of an ethic of care.¹⁴⁰ At other times, she is

136. *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring).

137. *Id.* at 737-38.

138. *Id.* at 736. In his concurrence, Justice Breyer suggested that Justice O'Connor's opinion went further, holding that there *would* be a constitutional right to assisted suicide in the absence of palliative care. *Id.* at 792 (Breyer, J., concurring). Given O'Connor's reluctance to consider abstract questions, however, his interpretation seems somewhat optimistic.

139. O'Connor's harsh stance towards individuals who have strayed is perhaps most evident in her criminal opinions and in her responses to petitions for federal habeas corpus relief. As a former state prosecutor and one time "law and order" candidate, *see supra* notes 23-26 and accompanying text, it is perhaps not surprising that O'Connor has typically sided with the state against the claims of criminal defendants. Here too, however, O'Connor's cases reveal an interesting pre-occupation with process and a concern for those individuals—but only those individuals—who can navigate complex procedural mazes. Like *Hodgson*, *Gebser*, and *Cruzan*, O'Connor's habeas cases simultaneously display a reluctance to deny petitioners any access to redress and an insistence that individuals demonstrate the foresight and competence to raise all claims in the correct manner. Those petitioners who cannot master the rigors of O'Connor's habeas jurisprudence (or afford an attorney sufficiently competent to do so) seem not to merit her sympathy. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (denying habeas relief to any federal claims defaulted in state court "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law"); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (O'Connor J., plurality opinion) (refusing to review "new" claims on habeas corpus unless the rule applies to matters "implicit in the concept of ordered liberty" or places "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe") (quoting *Mackey v. United States*, 401 U.S. 667, 692-93 (1971)); *Rose v. Lundy*, 455 U.S. 509 (1982) (holding that a court must dismiss any habeas petition containing unexhausted claims).

140. *See GILLIGAN, supra* note 40.

experientially myopic, unable to grasp the realities of those whose lives lie beyond her imagination.

VI. O'CONNOR ON THE MARKETPLACE

As we move from questions of human relationships and physical vulnerabilities to cases about economic relationships and financial dependencies, similar patterns emerge. Again, O'Connor appears unable to understand individuals who lack her own remarkable stamina¹⁴¹ and accomplishments. Those who are poor, it seems, have only themselves to blame.

This harsh, almost merciless, attitude toward those who have not managed to prosper is starkly portrayed in O'Connor's opinion in *Kadrmas v. Dickinson Public Schools*.¹⁴² In *Kadrmas*, the plaintiff challenged a \$97 per year service fee charged by the public school district to bus her daughter to school. She claimed that the statute unconstitutionally placed a greater obstacle in the path of poor families than wealthy families. O'Connor denied the claim, finding that the statute "discriminates against no suspect class and interferes with no fundamental right."¹⁴³ In reaching this conclusion, O'Connor did not consider the disturbing consequences of allowing the state to erect economic barriers to education. O'Connor's focus was instead on the choices available to the self-reliant family. "North Dakota," she wrote, "does not maintain a legal or a practical monopoly on the means of transporting children to school."¹⁴⁴ The fact that the so called private alternatives would cost more than ten times the school district's fee¹⁴⁵ was irrelevant to O'Connor, who noted that the family could try to "adjust" their debts.¹⁴⁶ After all, when O'Connor was growing up in a rural area during the Great Depression, her family managed (with the help of her grandmother) to send her to private school.¹⁴⁷ The *Kadrmas* family, O'Connor seems to believe, should have shown the same self-reliance.¹⁴⁸

O'Connor's other side, her empathy for those who strive to be self-sufficient, is evident in her opinion in *Bearden v. Georgia*.¹⁴⁹ As a condition of Danny

141. "Sandra is driven and can outwork them all," says a lawyer friend. *Sandra Day O'Connor: Up at 4 A.M. to Read Briefs, She Learns That A Woman Justice's Work is Never Done*, PEOPLE, Dec. 28, 1981, at 84.

142. 487 U.S. 450 (1988).

143. *Id.* at 465.

144. *Id.* at 460-61.

145. *See id.* at 455.

146. *Id.* at 461.

147. *See supra* note 11 and accompanying text.

148. Indeed, O'Connor is seldom sympathetic to plaintiffs seeking economic assistance from the government. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412 (1988) (finding no relief available to plaintiffs suing the Department of Health and Human Services for wrongful termination of disability benefits).

149. 461 U.S. 660 (1983).

Bearden's probation,¹⁵⁰ a Georgia court ordered him to pay a \$500 fine and \$250 in restitution. Bearden initially borrowed the money from his parents. When he lost his job, Bearden tried to find new employment, but with only a ninth grade education, he had no success. Bearden told his parole officer that his next payment would be late. When it was, his probation was revoked.¹⁵¹

O'Connor's opinion in *Bearden* is a particularly clear example of her attitude toward the poor:

If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. . . . But if the probationer has made *all reasonable efforts* to pay the fine or restitution, and yet cannot do so through *no fault of his own*, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.¹⁵²

In O'Connor's world, those who show initiative and effort are entitled to judicial support; those who merely complain, however, are unworthy of judicial intervention.

Her respect, even admiration, for the ruggedly self-reliant individual is strikingly evident in O'Connor's famous concurrence in *Price Waterhouse v. Hopkins*.¹⁵³ Ann Hopkins was aggressive and one of the accounting firm's best rainmakers. But she was denied partnership because she was not conventionally feminine in her dress and demeanor. To O'Connor, this was the essence of gender discrimination. Departing from established Title VII doctrine,¹⁵⁴ O'Connor, as is her wont, approached the case from the facts, to ensure that a woman as obviously talented as Ann Hopkins (or Sandra Day O'Connor perhaps?) could obtain relief under Title VII. Justice O'Connor struggled to distinguish the case from the disparate treatment construct that would have required Hopkins to prove the firm's subjective sexist animus, an almost

150. Bearden pleaded guilty to burglary and theft in the Georgia state courts. *See id.* at 662.

151. *See id.* at 663.

152. *Id.* at 668-69 (emphasis added) (citations and footnote omitted).

153. 490 U.S. 228 (1989) (O'Connor, J., concurring).

154. An examination of the abstruse complexities of Title VII, 42 U.S.C. § 2000 (1994 & Supp. II 1996), is beyond the scope of this Article. For our purposes, it is sufficient to note that Justice O'Connor altered the evidentiary framework by imposing a far more onerous burden than is usual on the defendant: "[O]n the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender." *Id.* at 261.

insurmountable burden given the rigidity of the relevant case law.¹⁵⁵

O'Connor's majority opinion in *Ford Motor Company v. EEOC*¹⁵⁶ is in stark contrast. That case was brought by a group of women with blue collar, factory jobs who had previously prevailed in a Title VII sex discrimination claim against Ford. Ford sought to toll the accrual of backpay liability by offering the plaintiffs the jobs they had originally been denied, but without retroactive seniority. The women testified that they had rejected the offer because they were worried about layoffs, which were then prevalent in the automobile industry.¹⁵⁷

In considering the nature and extent of the damages owed by Ford, O'Connor displayed an almost *Lochnerian*¹⁵⁸ disregard for the plaintiffs' job security concerns. According to O'Connor, requiring Ford to offer retroactive seniority would hurt those "innocent" male employees who had accrued seniority during the pendency of plaintiffs' litigation.¹⁵⁹ O'Connor was willing to force the successful plaintiffs to choose between a lower backpay award and job security in order to protect the seniority of non-parties to the litigation.¹⁶⁰ Interestingly, O'Connor imposed this choice in the absence of any statutory language mentioning the so-called innocent victims.¹⁶¹

The differences and similarities in O'Connor's approaches to *Price Waterhouse* and *Ford* are revealing. In both cases, O'Connor is willing to deviate from strict statutory text and from the dictates of prior precedent. In both cases, the reader senses that O'Connor's sensitivity to the facts drives the doctrine. Yet, her perception of the two scenarios is quite different. O'Connor, the successful career woman, can understand and empathize with Ann Hopkins and the humiliation she suffered.¹⁶² But O'Connor has little appreciation of the

155. O'Connor acknowledged that the rule she and the majority adopted was "at least a change in direction from some of our prior precedents." *Id.* at 270. For a full discussion of the case, see Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 514-516 (1996). The holding of *Price Waterhouse* was significantly modified by section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1202 (1994 & Supp. II 1996).

156. 458 U.S. 219 (1982).

157. *Id.* at 256-57 (Blackmun, J., dissenting).

158. *Lochner v. New York*, 198 U.S. 45 (1905). See also *supra* note 132 and accompanying text.

159. *Ford*, 458 U.S. at 239-41.

160. *Id.* at 237-41. See *infra* notes 162-70 and accompanying text for a discussion of other "innocent victims" whose rights trump those of plaintiffs burdened by discrimination.

161. For other examples of this type of reasoning, see Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 268-83 (1992) (explaining how this approach hurts plaintiffs).

162. Cf. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). That case involved a man who asked to be admitted to the state's all-female nursing program. In a majority opinion, O'Connor found for the plaintiff, stating: "[E]xcluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729. O'Connor's empathy for the hardworking, would-be professional confronting gender

economic vicissitudes faced by the women working at Ford and their concerns for job security are foreign to her. Once again, her experiential reasoning is bounded by the scope of her own life experiences.

A similar myopia is evident in Justice O'Connor's decisions on affirmative action. Since joining the Court, O'Connor has played a pivotal role in fashioning the Court's affirmative action jurisprudence, developing the doctrinal attack on race conscious remedies.¹⁶³ Echoing her concern for "innocent victims" in *Ford*, O'Connor's opinions in *City of Richmond v. J.A. Croson Co.*¹⁶⁴ and *Adarand Constructors, Inc. v. Peña*¹⁶⁵ have become the definitive analysis of the Court's elevation of the interests of white contractors who might be treated less favorably because of affirmative action policies over the interests of African American contractors who had been competitively disadvantaged by historically segregated markets.¹⁶⁶

O'Connor's methodology in the affirmative action cases is entirely consistent with her approach in other areas. She shows little concern for precedent. Indeed, in *Adarand* she was willing to overrule an opinion that was barely five years old.¹⁶⁷ Moreover, although O'Connor is widely known for championing states' rights,¹⁶⁸ her concern in *Croson* that African Americans might exercise power unfairly trumped her characteristic deference to the states and showed little respect for their legislative processes.¹⁶⁹

stereotypes is again palpable.

163. Interestingly, while affirmative action often includes consideration of gender, neither O'Connor nor the Court has explicitly critiqued the use of gender conscious remedies to the extent that they have condemned race dependent remedies. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (noting the "anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can . . . against African Americans . . .").

164. 488 U.S. 469 (1989).

165. 515 U.S. 200 (1995).

166. For further discussion, see Michael L. Manuel, *Adarand Constructors, Inc. v. Peña: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs?*, 31 NEW ENG. L. REV. 975 (1997); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 258-63 (1997); Margaret A. Sewell, *Adarand Constructors, Inc. v. Peña: The Armageddon of Affirmative Action*, 46 DEPAUL L. REV. 611, 624-39 (1997).

167. See *Adarand*, 515 U.S. at 226-27 (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), which adopted intermediate scrutiny when federal government employs benign racial classifications).

168. See *supra* note 27 and accompanying text; see also Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493 (1993); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

169. *Croson*, 488 U.S. at 498-99. In *Croson*, O'Connor observed that "a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature." *Id.* at 496. But see *New York v. United States*, 505 U.S. 144 (1992) (expressing concern for state

O'Connor's opinions in the affirmative action cases also reflect her discomfort with absolutist positions. After ruling in *Adarand* that strict scrutiny must always be applied to race conscious remedies,¹⁷⁰ she backed away from the obvious implications of that holding, making the remarkable statement that strict scrutiny is not necessarily "fatal in fact."¹⁷¹ One wonders, therefore, what all the fuss was about.

CONCLUSION

Sandra Day O'Connor's ascension to the Supreme Court fulfilled a campaign promise. While courting the female vote in 1980, Ronald Reagan pledged to appoint a woman to the Supreme Court.¹⁷² When a vacancy appeared, he obliged.

The question remains: Did it make a difference? Does it matter that women now sit on the high court? Of course it does. It matters politically¹⁷³ and it matters symbolically. While the impact is not quantifiable, it is no doubt important to young women entering the legal profession to see the absence of a glass ceiling at the Supreme Court.

And it likely matters in other ways as well. Our review of O'Connor's opinions demonstrates that to a large degree she does ask the woman question. In her writings we see a particular concern for and engagement with issues that have historically affected women's lives. While, no doubt, some male justices have also been deeply involved with these issues,¹⁷⁴ O'Connor's absorption is likely not coincidental. As a woman who has had children and experienced discrimination in the workplace, she has particular empathy and concern for one important subset of the cases before her.

Moreover, O'Connor often does speak in a "different voice," from her male

legislation). See also Judith Olans Brown & Phyllis Tropper Baumann, *Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell's America*, 15 VT. L. REV. 49, 63 (1990) (criticizing O'Connor's analysis in *Croson*).

170. *Adarand*, 515 U.S. at 236.

171. *Id.* at 237.

172. See DAVID M. O'BRIEN, JUDICIAL ROULETTE 48 (1988); Cannon, *supra* note 8.

173. Presidents have always felt it important to select Supreme Court nominees with an eye to different constituencies. In the Nineteenth Century, the constituencies were defined geographically. See O'BRIEN, *supra* note 172, at 44. More recently, diversity of religion, race and gender have become important. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 61-65 (3d ed. 1992); BARBARA A. PERRY, A REPRESENTATIVE SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 11-14 (1991).

174. Clearly Justice Blackmun had a deep commitment to women's reproductive rights. See *Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part) ("Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life.").

colleagues.¹⁷⁵ A survey of her corpus shows a particular fondness for contextual analysis, experiential reasoning, and incremental decision-making. In general she avoids grand theories.¹⁷⁶ As she herself has stated, "[i]t is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases. . . . But the same constitutional principle may operate very differently in different contexts And setting forth a unitary test for a broad set of cases may sometimes do more harm than good."¹⁷⁷ In recognizing the dominance of context, O'Connor often seems to bring the doctrine to the facts, instead of forcing the facts to fit the doctrine.

But to conclude from this that Justice O'Connor is a *feminist* is to conflate feminist methodology with feminist results.¹⁷⁸ While O'Connor's approach to judging may incorporate feminist reasoning, those very techniques often lead her to conclusions that seem quite at odds with the feminist agenda.¹⁷⁹ Ironically, O'Connor's reliance upon contextual and experiential reasoning is often the source of her disagreement with recognizably feminist goals.

The scholarly focus on O'Connor's experiences as a woman has often obscured the many ways in which her experiences are more similar to than different from those of her male colleagues. Supreme Court Justices have traditionally been white, Anglo-Saxon Protestants from the middle or upper classes, with law degrees from prestigious institutions.¹⁸⁰ Justice O'Connor fits this mold perfectly.

Thus, if it is true that Justice O'Connor frequently employs experiential reasoning, it should not be surprising that the experiences that resonate with her are those typical of educated, upper middle class, white women. Her experiences may give her an acute understanding of some plaintiffs' circumstances, but they

175. GILLIGAN, *supra* note 40.

176. Justice O'Connor may, however, be developing a relatively consistent "grand theory" about state sovereignty. Since joining the bench, Justice O'Connor has been a firm supporter of the view that states qua states have sovereign rights. *See, e.g.,* *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). For a discussion of Justice O'Connor's views on this subject, see Levy, *supra* note 168; Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. (1999) (forthcoming); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

177. *Board of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring).

178. *See* Bartlett, *supra* note 4, at 887.

179. *See* Behuniak-Long, *supra* note 1.

180. *See* ABRAHAM, *supra* note 173, at 61. There has been little religious diversity on the Court. It was not until 1836 that a Catholic, Justice Roger B. Taney, was appointed. *See id.* at 63. Since then, there has usually been one Catholic on the Court, although there were none between 1949 and 1956, *see id.*, and there have been two since the Reagan era. *See* O'BRIEN, *supra* note 172, at 45. The first non-Christian to be appointed was Louis D. Brandeis in 1916. *See* ABRAHAM, *supra* note 173, at 63. After Brandeis' appointment, there was one and only one Jew on the high court until 1969, when Justice Fortas resigned. *See id.* at 64. No non-Christians were on the Court from that date until the appointment of Justice Ginsburg in 1993. No justices have been Muslim, Buddhist, Hindu, or adherents of any non-Western religion.

simultaneously isolate her from many others. O'Connor's experiential reasoning offers little foundation for understanding the lives of African Americans,¹⁸¹ the poor,¹⁸² blue collar workers,¹⁸³ aliens,¹⁸⁴ criminal defendants,¹⁸⁵ individuals who have made or have been forced into choices outside the boundaries of conventional morality,¹⁸⁶ and, more generally, those who seem to lack the self-sufficiency and toughness¹⁸⁷ that have characterized O'Connor's own life.

In O'Connor's jurisprudence, we see both the strengths and the limitations of choosing judges for their cultural or demographic identities. If we select a judge because of her gender, race, religion, or ethnicity, we are implicitly stating that those experiences are relevant to the process of judging. Clearly they are, and by diversifying the bench, we no doubt enrich the decision-making process. But, in legitimating reliance upon experience and identity, we risk validating the way in which a judge's experiences also serve to narrow her perceptions. O'Connor brings her femininity to the bench, but she also brings her Protestantism, her wealth, her western heritage, her careerism, and her personal courage. Her particular feminism is rugged and self-reliant. The experiences she draws upon, like the experiences any judge draws upon, are as limiting as they are enlightening.

181. See *supra* notes 162-70 and accompanying text.

182. See *supra* notes 141-43, 150-52 and accompanying text.

183. See *supra* notes 155-60 and accompanying text.

184. See *supra* note 111 and accompanying text.

185. See *supra* note 139 and accompanying text.

186. See *supra* notes 87-90 and accompanying text.

187. See *supra* notes 115-22, 126-33, 149-52 and accompanying text.

FEMINISTS & CONTRACT DOCTRINE

DEBORA L. THREEDY*

INTRODUCTION

In the past thirty years, feminism has had an undeniable impact upon law. The number of women law students, lawyers, and judges has increased dramatically.¹ New causes of action have been recognized,² and old remedies revised,³ as a consequence of feminists' work. Feminist jurisprudence has influenced legal doctrine; for example, articles and books have been written on the impact of feminist theory on law school subjects, such as torts⁴ and criminal law.⁵

Ten years ago, a prominent male contracts professor suggested that "the male bias of our society . . . has not had important consequences for contract law."⁶ This Article is meant to respond to that suggestion by exploring the influence of feminism on this area of law.⁷

* Professor, University of Utah College of Law. This piece grew out of a presentation I gave with Professor Karen Engle to the Women's Law Caucus of the University of Utah College of Law in the spring of 1994. The research for this paper was funded by grants from the Faculty Development Committee. I would like to thank Tawni Anderson for her research assistance.

1. See KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 750-51 (2d ed. 1998)

2. See, e.g., CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (MacKinnon's work substantially contributed to the recognition of sexual harassment as a violation of Title VII).

3. For example, we have seen increased responsiveness to domestic violence. See BARTLETT & HARRIS, *supra* note 1, at 566-70.

4. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

5. See Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Nancy S. Erickson and Nadine Taub, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309 (1990).

6. Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1030 (1992) [hereinafter *Rescuing Impossibility Doctrine*] (quoting letter from W. David Slawson, Professor of Law, University of Southern California, to Mary Joe Frug 2 (June 24, 1988)). See also Patricia Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791, 800 n.48 (1991) (suggesting that the letter led to a "brouhaha of modest proportions").

7. The number of scholars exploring the topic of feminism's influence on contract doctrine is small but growing. Examples of writing on the subject include: Elizabeth S. Anderson, *Women and Contracts: No New Deal*, 88 MICH. L. REV. 1792 (1990) (reviewing CAROLE PATEMENT, *THE SEXUAL CONTRACT* (1988)); Jean Braucher, *Contract v. Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) [hereinafter *Re-Reading Contracts*];

Let us begin by focusing on the professor's comment in order to unearth the implicit assumptions buried within it. I read his claim that male bias has not had important consequences for contract law as having three components: the concept of "male bias," the concept of "contract law," and the judgment that the effect of male bias on contract law has not been "important." Three interpretations of the comment come to mind; each emphasizes a different component and reveals the hidden assumptions underlying each component.

The first possible interpretation is that the professor believed that, once upon a time, contract law suffered from male bias, but that the problem has been cured and is no longer worth discussing. Such an interpretation implicitly identifies "male bias" with legalized sex discrimination, or formal inequality. In this view, at one time "male bias" prevented women (at least married women) as a matter of law from contracting, but once that legal barrier was removed, there was no sexism left in contract law.

This interpretation is based upon a limited view of "male bias." For the most part, women did gain formal equality with respect to contract law in the last century, but that did not remove all of the consequences of their prior exclusion. The fundamental doctrines of contract law were developed during the time when most women were not participants in the market and certainly were not members of the bench and bar.

Another possible interpretation is that the professor believed contract law has a distinctive quality about it. He might believe that this distinctive quality, moreover, somehow immunizes contract law from the otherwise pervasive effects of patriarchy, or "male bias." One could claim such immunity for contract law if one conceived it as being neutral and objective.

It is precisely this conception of contract law, however, that is under attack by feminists.⁸ Feminists have theorized that law, including contract law, is itself "gendered."⁹ When feminists make such an assertion what they mean is this:

Leo Flynn & Anna Lawson, *Gender, Sexuality & the Doctrine of Detrimental Reliance*, 3 FEMINIST LEGAL STUD. 105 (1995); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); *Rescuing Impossibility Doctrine*, *supra* note 6; Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506 (1990) (reviewing TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989)); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981) (book review); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982) [hereinafter *Contractual Ordering of Marriage*]; Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55 (1991) [hereinafter *Gendered Curriculum*]; Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995); Tidwell & Linzer, *supra* note 6.

8. Feminists, of course, are not the only ones attacking this conception of contract law. Critical legal scholars have also called into question the apparent neutrality and objectivity of contract doctrine. See, e.g., Jay Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

9. See, e.g., Frances E. Olsen, *The Sex of Law*, in THE POLITICS OF LAW: A PROGRESSIVE

Law is a human artifact; it is constructed by individual judges, legislators, and lawyers acting within the social context of their time, race, gender, and class. American law has, until very recently, been constructed almost exclusively by the male gender. Therefore, it should not be surprising that "law" incorporates and reflects male gender traits.¹⁰ Some of these traits are identified as the preference for rationality over other ways of knowing (e.g., intuition); for objectivity over subjectivity; for abstraction over contextualization; and for hierarchical decision-making over consensus or compromise.¹¹ Contract law, like law more generally, is said to be male-gendered because of the perceived presence of these traits.¹² In other words, contract law is not neutral; it is one of the many social structures that supports a male preference. Further, it is not objective; it has a perspective, but its point of view is masked.¹³

A final possible interpretation is that the professor was acknowledging that "male bias" has impacted contract law, but believes the consequences are unimportant. One could call this the "de minimis" argument. It is an argument with which feminists are familiar. For example, when feminists began to push for gender-inclusive language, they received a fair degree of ridicule, including variations on the theme: "How can using 'she' as well as 'he' change anything? Why are you making such a big deal over such a little thing?"¹⁴ Yet today, gender-inclusive language is the norm, even in first year casebooks and traditional law reviews. I do not think this is just "political correctness" at work. I believe it reflects a shift in thinking; as a society, we no longer assume, as we once did, that lawyers, judges, business people, and felons are men, and this shift is reflected in our language. Moreover, it is not easy to determine which came

CRITIQUE 453 (David Kairys ed., 2d ed. 1990); Symposium, *Is the Law Male?*, 69 CHI.-KENT L. REV. 293 (1993); Ramona L. Paetzold, *Feminism and Business Law: The Essential Interconnection*, 31 AM. BUS. L.J. 699, 702 & n.9 (1994).

10. In referring to "male gender traits" I wish to make it clear that there is nothing essentialist about such a term. Because gender is socially constructed and mutable, the content of male gender traits, as well as female gender traits, will change over time and place. In other words, the phrase "male gender traits" in the text sentence is a short-hand reference to those traits generally accepted as appropriate to the male gender at a specific time (primarily the Nineteenth Century) and place (the United States of America). Even this may be painting with too broad a brush. What is "generally accepted as appropriate to the male gender" may be specific to different regions, ethnicities, generations, and classes. Finally, there have always been men (and women) who have acted unconventionally, contrary to gender expectations.

11. See Olsen, *supra* note 9, at 453.

12. *Id.* at 454.

13. See, e.g., Paetzold, *supra* note 9, at 699-700 (arguing that personal values influence everyone's perspectives, but that the more "mainstream" such perspectives are, the more likely they are to be perceived as neutral and objective).

14. See, e.g., David R. Dow, *Law School Feminist Chic and Respect for Persons: Comments on Contract Theory and Feminism*, in *The Flesh-Colored Band Aid*, 28 HOUS. L. REV. 819, 849-50 (1991) (referring to feminists' objections to the use of "seminal" to mean "formative" and "man" to mean "person" as "excrescences of feminist theory").

first, the change in language or the shift in thinking.¹⁵ The point is that, from a feminist perspective, it is difficult to decide what consequences of sexism are unimportant. From one point of view, there are no unimportant consequences of male bias; they are all part of the whole.

This Article challenges the professor's comment, no matter how it is interpreted. The Article argues that contract law is as susceptible to "male bias" or sexism as any other area of the law, the effects of this sexism are not trivial, and they continue to this day.

The following two sections suggest two ways of looking at the gendered nature of contract law. I borrow a sports metaphor¹⁶ to do this. First, we can look at the "game" itself, the domain of contract law and how it is defined. We can ask whether the definition of contract reflects a male perspective, and then consider whether feminism has impacted that definition. Second, we can look at the "rules of the game" and again ask the same question about male perspective and feminism's impact.

I. THE GAME DEFINED

A. *The Gendered Nature of the Game*

The gendered nature of contract law's domain can be discovered by examining how women and women's concerns historically were excluded from that domain. This exclusion occurred in two ways: First, contract pertained to market transactions which generally excluded intra-familial bargaining; and, second, women were barred by law and custom from engaging in market transactions.

1. *Excluding Family From the Game.*—The standard definition of a contract is the bargained for exchange of consideration.¹⁷ Nothing in this definition explicitly restricts a contract to a "market" transaction. However, contracts are typically thought of as market transactions because implicitly "bargaining" is

15. See Margaret Jane Radin, *Market-inalienability*, 100 HARV. L. REV. 1849, 1877-87 (1987) (discussing how rhetoric, specifically the rhetoric of the market, affects our understanding of reality and thus how we behave).

16. Although I am not a sports fan, I found I had to learn sports talk when I entered practice as a commercial litigator. Perhaps it was mere coincidence that most of the predominantly male litigators in my firm used sports talk, but I think not. Even today in my contracts and commercial law courses, I find myself lapsing into sports talk. Thus, it seems appropriate to me to use sports talk in this article about gender and contracts. See Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225, 233 (1998) ("[O]ne of the primary purposes and effects of the use of much sports terminology in non-sports contexts is the exclusion of women."); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 226-27 (1995).

17. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1979).

thought of as market behavior. The "market" is where people act as self-interested, rational, autonomous individuals concerned with the exchange of economic value.¹⁸

To define something as a "market" transaction or "market" behavior, moreover, implies that there is a realm of activity that is "non-market." Sometimes this contrasting behavior is labeled "social." Thus, contract's domain is thought of as excluding certain reciprocal transactions, even though they may be "bargained for" in the broadest sense of that term, because "we" understand that these transactions are not "market" transactions. For example, you ask me to help you move, promising to feed me in return, and I agree. If either of us fails to perform, contract law will not provide a remedy.

"Family" is also considered outside the market.¹⁹ Family bargaining, therefore, is usually—although not always—outside the domain of contract law. *Miller v. Miller*²⁰ exemplifies the exclusion of intra-familial contracts from the domain of contract law. In that case, Mrs. Miller had grounds for seeking separation or divorce due to her husband's alcoholism and failure to support her. Instead, she entered into a written agreement with her husband in which she would not leave him and would continue to provide him with a home if he agreed to give her \$200 a year for household expenses. When Mr. Miller failed to abide by this agreement, she took him to court, seeking not a divorce but enforcement of their contract. The court refused to enforce the contract; as her husband argued, Mrs. Miller "merely agreed to do what by law she was bound to do."²¹

Not all bargains between family members are excluded from contract law, however. A pair of first year contract law cases illustrates the tensions between "family" and "market." When an uncle promised his nephew \$5000 if the nephew would refrain from smoking, drinking and gambling until he turned twenty-one, the court concluded they were bargaining; thus, the nephew's refraining constituted consideration and the parties had contracted.²² When, however, a brother-in-law promised to give his widowed sister-in-law a place to raise her family if she would give up homesteading and move closer to him, the

18.

The determination of what is valuable is another facet of contract law that begins with premises that exclude women. . . . Indeed, the determination of the kinds of work, products and promises that contract doctrine values seems to be very gender-biased. Those things which men have traditionally done or produced are valuable. The cleaning of houses, the raising of children, the giving of comfort, and the cooking of meals, however, are not peppercorns. Yet these activities are usually insufficient to support a contract.

Tidwell & Linzer, *supra* note 6, at 804-05.

19. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

20. 35 N.W. 464 (Iowa 1887).

21. *Id.* at 464. See also *Contractual Ordering of Marriage*, *supra* note 7, at 230 n.68, 231 nn.70 & 71.

22. *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

court did not perceive them as bargaining; moving was not consideration and the parties had not contracted.²³ One explanation for these divergent outcomes is that in the first case the intra-familial agreement occurs between two males, while in the latter it occurs between a male and female relation.²⁴ Bargaining, like beauty, is in the eye of the beholder and judges may be less likely to perceive contract bargaining between the sexes in a family context.

This same reluctance to see market behavior between the sexes in a family context occurs in the area of detrimental reliance. Detrimental reliance, also known as promissory estoppel, is an alternative basis for finding a contract.²⁵ In cases alleging the existence of a contract based upon detrimental reliance between cohabitating heterosexual couples, courts are more likely to find detrimental reliance where the woman performs non-domestic acts.²⁶ For example, non-domestic acts, such as making mortgage payments, paying for improvements, and performing heavy remodeling, are not what one expects a woman to do for a man; therefore, these acts can provide a basis for detrimental reliance. However, having babies, refraining from paid employment, and decorating the home are traditionally "women's work" (meaning nonmarket) and thus cannot provide such a basis.²⁷ The existence of family relations between parties of different sexes affects whether their bargaining is seen as market activity.

2. *Excluding Women From the Game.*—The game of "Contracts," then, can roughly be defined as including market transactions and excluding social and family transactions. Such a definition today may not look as if it is reflecting any particular gender perspective, but the definition of contract that we use today has its roots in the Nineteenth Century. At the time when the domain of contract law was being established, women were participants in social and family transactions, but by and large they were excluded from market transactions.²⁸ Thus, because

23. *Kirksey v. Kirksey*, 8 Ala. 131 (Ala. 1845).

24. There are, of course, alternative explanations. It can be pointed out that in the nephew's case, it was not a necessary prerequisite for him to give up smoking, etc., in order for the uncle to give him \$5000, while it was necessary for the widow to give up her current home and move to the home of her brother-in-law in order for him to give her a place to live. Thus, the widow's moving could be seen as a condition to the brother-in-law's gift. Another possibility is the fact that the uncle never renounced his promise; the lawsuit was between the nephew and the administrator of the uncle's estate. The brother-in-law, however, after allowing the widow to live on his property for several years, did renounce any further obligation.

25. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

26. Flynn & Lawson, *supra* note 7, at 117-18.

27. *See id.*

28. This exclusion, of course, was never complete. One of the projects of feminism has been to recover women's "lost" history. Karen Gross and her collaborators unearthed bankruptcy filings by women debtors under the Bankruptcy Acts of 1800 and 1841. Karen Gross et al., *Ladies in Red*:

contract law primarily pertained to market transactions, women were by and large excluded from contract law's domain.

For most of the last century married women were not legally competent to make contracts in their own name. The reason for refusing to admit Myra Bradwell to the Illinois state bar in 1869 was that, as a married woman, she could not make or enforce contracts.²⁹ Up to the early 1800s, the common law doctrine of coverture³⁰ provided that "married women could not enter into agreements with their husbands, contract with parties outside their marriages, or sue or be sued in their own names on any matters."³¹ Man and woman merged in marriage into one entity, the man; thus, there was no one, other than the man, to contract with third parties and there was no room within the marriage for contractual relations. "When a single-entity view of marriage prevailed, it was logical that only the unit could . . . create contracts More important, any notion of bargaining, exchange, or negotiation within a marriage-as-unit would be anomalous and perhaps even offensive as a matter of policy."³²

The view of marriage as a merging of the woman into the man led to courts' reluctance to enforce "contracts" within marriage. In the last century, generally, women did not participate in the market, and when women tried to bring the market home, they found that contract law did not apply between family

Learning From America's First Female Bankrupts, 40 AM. J. LEGAL HIST. 1 (1996). They write: "People not familiar with revisionist history assume, for example, that women in [Eighteenth] and [Nineteenth C]entury America did not work, own property, or obtain credit. In this sense, our research is galvanizing because our findings upset preconceived notions of what women in early America were like." *Id.* at 31. See generally Karin Mika, *Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence*, 9 HASTINGS WOMEN'S L.J. 273 (1998).

29. *Bradwell v. The State*, 83 U.S. (16 Wall.) 130, 131 (1872). See also Mika, *supra* note 28, at 292; KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* 16-20 (1986).

30. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 355-66 (1857). Of course, coverture can be seen as an improvement over earlier times. Before coverture with its concept of marriage-as-unit, marriage was seen as a contract between two men, the father and the groom, or between two families or clans; thus, marriage was seen as an economic exchange. "At least semantically, marriage and contract share common ground. Contract terminology appears often in conjunction with marriage To some extent this contract terminology may be a carryover from the era when marriage was a major occasion for bargain and exchange between the families of the bride and groom." *Contractual Ordering of Marriage*, *supra* note 7, at 224. See generally Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 283-86 (1997) (discussing derivation of marriage customs). So perhaps we should at least recognize that the woman's role of merger with the husband can be thought of as an improvement over the woman's earlier role, as the subject of exchange.

31. Richard H. Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 BERKELEY WOMEN'S L.J. 42, 48 (1986) [hereinafter *Married Women's Property and Inheritance*]. See also *Contractual Ordering of Marriage*, *supra* note 7, at 274-75.

32. *Contractual Ordering of Marriage*, *supra* note 7, at 276-77.

members.³³

The reversal of this common law prohibition against women's contracting, as any social change, occurred over a period of time, by fits and starts.³⁴ Antenuptial agreements establishing a "separate estate" for the wife began to come into use and were over time given judicial enforcement.³⁵ By the second half of the Nineteenth Century, the ability of married women to control their own property had achieved some degree of standardization through the widespread adoption of Married Women's Property Acts, giving women the legal right to contract and to sue and be sued.³⁶ However, the last vestiges of the doctrine of coverture did not disappear until 1981 when the U.S. Supreme Court ruled that state laws allowing a husband to sell or encumber marital property without the wife's consent were unconstitutional.³⁷

B. Redefining the Game

If the market-based domain of contracts is a consequence of gender, how might feminism go about challenging, or redefining that domain? First of all, feminists can question the market/nonmarket dichotomy, challenging and unsettling what we think of as market transactions. Feminists do this in two ways: by bringing traditionally nonmarket "women's labor" to the market, and by bringing the market home.

The most visible example of bringing women's labor to market is in the area of reproduction (pun intended). With the development of new reproductive technologies, we find ourselves confronting all the issues of contractual surrogacy, from intentional parenthood to "wombs for hire." Sometimes I think that the single greatest contribution of feminism to contract doctrine in the last decade is the inclusion of *In re Baby M*³⁸ in standard first year contracts

33. See *supra* notes 20-21 and accompanying text. As Marjorie Shultz so cogently puts it: "[L]egal rules change at the boundary of marriage. It is as if the family were surrounded by a fence. Ordinary rules run up against that fence and bounce off or are at least deflected." *Gendered Curriculum*, *supra* note 7, at 58.

34. See *Married Women's Property and Inheritance*, *supra* note 31, at 47.

35. See *id.* at 44, 50-51; see also Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1372-81 (1983) [hereinafter *Married Women's Property Law*].

36. *Married Women's Property and Inheritance*, *supra* note 31, at 52; *Married Women's Property Law*, *supra* note 35, at 1400-04. For a contemporaneous view of the Married Women's Property Acts, read James Fenimore Cooper's novel, *The Ways of the Hour*. JAMES FENIMORE COOPER, *THE WAYS OF THE HOUR* (1850). Cooper, a lawyer, has several of the novel's characters rail against the "unnatural" acts. *Id.* at 17, 180-82.

37. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). In that case, the Court held unconstitutional under the Fourteenth Amendment a Louisiana statute that provided in pertinent part: "The husband is the head and master . . . and may alienate [the community property] by an onerous title, without the consent and permission of his wife." *Id.* at 457 n.1.

38. 537 A.2d 1227 (N.J. 1988). Cf. A CONTRACTS ANTHOLOGY 174 (Peter Linzer ed., 2d ed. 1995) (suggesting that the inclusion of reproductive issues in contracts casebooks may be a

textbooks.

In the *Baby M* case, the New Jersey Supreme Court held that the surrogacy contract between the Sterns and Mary Beth Whitehead was unenforceable, in part because it was contrary to public policy.³⁹ Shortly after the decision came out, feminist contracts professors began handing out photocopies of the decision. Today, the case has been "mainstreamed;" it appears in first year contracts casebooks.⁴⁰ While the case did hold the particular surrogacy contract at issue void, it opened the door for such contracts, and the case itself has become a tool for initiating class discussions about whether such contracts should be enforceable.

The market/nonmarket boundary is also being challenged in the other direction: Market concepts are being imported into the realm of family. Some feminist theorists have argued for the application of contract principles to marriage.⁴¹ Legislative proposals are being considered to allow contract-based marriages.⁴²

Not all feminists agree, however, that breaching the boundary between family and market is a good thing.⁴³ Taking surrogacy as an example,⁴⁴ feminists who support contractual surrogacy do so because they believe that on balance it will improve the situation of women.⁴⁵ Legalizing contractual surrogacy will

response to *Re-Reading Contracts*, *supra* note 7).

39. *In re Baby M*, 537 A.2d at 1246-50.

40. E.g., ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 412 (2d ed. 1993).

41. See *Contractual Ordering of Marriage*, *supra* note 7, at 301-03; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 348 n.153 [hereinafter *Reproductive Technology*]. See also Mary Becker, Presentation at 1989 AALS (arguing that definite contract rules would treat women better than indefinite rules of family law that give lots of discretion to (primarily male) judges). But see *infra* note 42 and accompanying text.

42. E.g., Illinois Marriage Contract Act, H.B. 2095, 89th Gen. Assembly (Ill.); An Act Relating to Written Marriage Contracts, H.B. 1711, 54th Leg., 1995 Reg. Sess. (Wash.). Both of these proposed statutes seek to limit the granting of a divorce to contractually agreed upon grounds.

43. See, e.g., Martha Albertson Fineman, *A Legal (and Otherwise) Realist Response to "Sex as Contract,"* 4 COLUM. J. GENDER & L. 128 (1994); Mary Lyndon Shanley, "Surrogate Mothering" and Women's Freedom: *A Critique of Contracts for Human Reproduction*, 18 SIGNS 618, 634-36 (1993). See also Radin, *supra* note 15, at 1917 n.244 (discussing "double bind" for women with less social wealth and power than their spouse, whether marriage is conceived of as contract or status).

44. One could also use prostitution as an example. Feminists who support the legalization of prostitution do so because they believe that on balance it will improve the situation of women. Legalization will improve the lives of women in prostitution by removing harassment from police, violence from pimps and fear of loss of custody of their children if their occupation were known. Women as a class will benefit because of the availability of a means of earning a significant income.

45. Believers in the market (law and economics types, for example) support contractual surrogacy (and legalized prostitution) as well. See RICHARD A. POSNER, *SEX AND REASON* 421-29

improve the lives of surrogates by "mainstreaming" their work, giving them the same protections as any other employee. Women as a class will benefit economically because of the increased availability of a means of earning income.

Conversely, the commodification of reproduction through surrogacy for hire gives some feminists pause.⁴⁶ They point out that the market is no friend of women: Women still earn less than men even when all factors such as education and seniority are taken into account.⁴⁷ Labeling this "market failure" does not reassure them. Legalization of surrogacy for hire may in fact result in the victimization of women who may be economically compelled to bear children for money.⁴⁸

These feminists see contract not as a means of creating connections, but as a cause of alienation.⁴⁹ They would argue that contract implies commodification, and "commodification simultaneously expresses and creates alienation."⁵⁰ This view sees "a necessary connection between this market alienability and human alienation."⁵¹

Breaching the market/family divide thus presents feminists with a "double

(1992) (arguing for contractual surrogacy). It is a mistake, however, to assume that two radically different normative views come to the "same" conclusion. See Radin, *supra* note 15, at 1936-37. Market believers support the commodification of sexual and reproductive services, but are agnostics as to whether that will improve the situation of the women providing such services.

46. See, e.g., Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303 (1993); Radin, *supra* note 15, at 1903-36; Shanley, *supra* note 43, at 624-33.

47. See, e.g., BARTLETT & HARRIS, *supra* note 1, at 161 (discussing gender wage gap of attorneys).

48. Similarly, some feminists fear that legalization of sexual services will reduce the earnings and autonomy of sex workers. In Nevada, for example, women sex workers are highly regulated as to hours, places of employment, medical testing, etc. Some of these regulations are arguably unconstitutional, such as ones prohibiting former sex workers from remaining in the town where they worked. See Aimee Nagles & Heather Brereton, *Sex for Sale: A Proposal for Prostitution Reform* 58-59 (1998) (unpublished manuscript, on file with author). They also are concerned about the ramifications of legalized prostitution for all women. One fear is that, if prostitution is legally sanctioned, only the well-off could afford not to be prostitutes. Cf. *AN INDECENT PROPOSAL* (Paramount 1993) (starring Robert Redford and Demi Moore, a movie in which a naive young wife agrees to sleep with a millionaire to fund her husband's dream).

49. See generally Robert Batey, *Alienation by Contract* in Paris Trout, 35 S. TEX. L. REV. 289, 290 (1994) (exploring the critique that contract law has "a high potential for alienation"). But cf. PATRICIA WILLIAMS, *The Pain of Word Bondage*, in *THE ALCHEMY OF RACE AND RIGHTS* 146, 146-48 (1991) (discussing how for a white male colleague contract implied alienation while for her contract implied wholeness: "For me, stranger-stranger relations are better than stranger-chattel.").

50. Radin, *supra* note 15, at 1871.

51. *Id.* The critique in Radin's piece is actually attributed to Marx rather than feminists opposed to bringing contract into the realm of the family, but in the context of marriage, sexual services and surrogacy, I believe it is an accurate description of the latter's views.

bind:"⁵²

If the social regime permits buying and selling of sexual and reproductive activities . . . there is a threat to the personhood of women, who are the "owners" of these "commodities" . . . because essential attributes are treated as severable fungible objects, and this denies the integrity and uniqueness of the self. But if the social regime prohibits this kind of commodification, it denies women the choice to market their sexual or reproductive services, and given the current feminization of poverty and lack of avenues for free choice for women, this also poses a threat to the personhood of women.⁵³

A way out of this double bind may exist, however. The long-term consequences of the unsettling of contract's domain are difficult to predict but one possibility is a fundamental reconception of the paradigm of a contract. Such a reconceptualization might alleviate the concerns about alienation and victimization.

The market-based paradigm is that of arm's length, autonomous transactors engaged in a discrete exchange. Relational contract theorists⁵⁴ have challenged this paradigm on both empirical and normative grounds. There has already been some "cross-fertilization" between relational contract theorists and feminists and more can be expected.⁵⁵

52. "The double bind is a series of two-pronged dilemmas in which both prongs are, or can be, losers for the oppressed." Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1704 (1990).

53. *Id.* at 1699-1700. *See also id.* at 1703-04 (discussing double bind in the context of the conceptualization of marriage as a contract).

54. The school of relational contract theory is largely the brainchild of Ian Macneil. *See, e.g.,* IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980). Other proponents of relational contract theory are Stewart Macauley and Peter Linzer. "With Macneil we move out of the world of the autonomous rights-bearing individual and into a world where every person is inextricably bound to others by a complex web of interdependence and relations." James Cassels, Book Reviews, 27 MCGILL L.J. 591, 602 (1982) (reviewing CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980)).

55. *E.g.,* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 515 n.136, 523, 523 & nn.181-82. *See also* Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 162 ("Although the feminist writers have not focused much on contracts, their thesis is most relevant [to relational contract theory].") (citation omitted). According to Linzer, the feminist "thesis" is "'that women tend to have a more intersubjective sense of self than men and that the feminine perspective is therefore more other-directed.'" *Id.* at 162 (quoting Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584-85 (1986)). This conception of the feminist thesis is accurate only for that branch of feminism called cultural or relational feminism. *See infra* notes 59-61 and accompanying text.

Relational contract theorists argue that discrete contract transactions are rare and relatively unimportant in today's world. Instead, they suggest that the contract paradigm should be that of an on-going, complex, multi-faceted, constantly renegotiated relationship.⁵⁶ As a result of this conception of a contract as a relationship, these theorists identify certain values as being important to contract, values such as mutuality (meaning equality of bargaining power) and solidarity (meaning trust and cooperation).⁵⁷ Because they view contract law as being the law of relationships, they can envision marriage as within the realm of contract.⁵⁸

Relational contract theorists share a normative vision with the branch of feminism called relational or cultural feminism.⁵⁹ Relational feminism also

Some feminist theorists have in turn borrowed from Macneil's work. See *Contractual Ordering of Marriage*, *supra* note 7, at 301-03; *Reproductive Technology*, *supra* note 41, at 348 n.153. Shultz has taken the position that contract doctrine should apply to marriage and surrogacy. In discussing the application of contract principles to marriage, she states:

The overriding importance of continuing relationships; the whole-person nature of the exchange; the presence of quantifiable and nonquantifiable elements; the expected range of interaction, from altruism to self-interest to conflict; the need for planning as a continuing process that focuses on flexibility of structure and procedure rather than on any single transaction; the emphasis on remedies that repair and restructure relationships rather than replace a specific failed performance—each of these characteristics of Macneil's relational contract type is an important characteristic of marriage.

Contractual Ordering of Marriage, *supra* note 7, at 302 (citation omitted). See also Braucher, *supra* note 7, at 710-12; Testy, *supra* note 7, at 229. Additionally, Patricia A. Tidwell and Peter Linzer have written a piece that explicitly explores the common ground between the two. See Tidwell & Linzer, *supra* note 6.

56. Macneil's definition of contract reflects this emphasis on the relationship between the parties (rather than on the things exchanged which is the focus of the classical definition of consideration): "[T]he realm of contract encompasses all relations among people in the course of exchanging and projecting exchange into the future." Macneil, *supra* note 55, at 523.

57. Conversely, traditional contract theory enshrines autonomy and consent ("freedom of contract") as the central values of contract law, while the more recent economic model of contracts focuses on wealth and efficiency maximization. See Braucher, *supra* note 7, at 702-09.

58. See *Contractual Ordering of Marriage*, *supra* note 7, at 302 (pointing out that Macneil identifies marriage as a type of relational contract).

59. There is not, of course, a single feminist viewpoint: "Feminism is correctly characterized by a multiplicity of approaches." Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 NW. U. L. REV. 1286, 1289 n.4 (1993). As a result, on controversial issues such as surrogacy and prostitution, there is not a single, unified "feminist" position; rather, different feminists embrace opposing positions. To confuse matters further, individual feminists may identify with more than one feminist approach. It is more useful to identify the issues around which different theories have clustered, rather than to attempt to label particular feminists as belonging to one or another feminist school.

Although others have categorized the "feminisms" differently, in my opinion, four clusters of issues define the different feminist approaches. Achieving equality, both in the sense of formal

focuses on the web of connection between people.⁶⁰ Human interconnections rather than hierarchical rights lie at the heart of much of relational feminism. These feminists advocate an “ethic of care” to supplement, if not replace, the traditional rights-based ethic that underlies much of law.⁶¹

There are definite parallels between relational contract theory and relational feminism. Taking these two viewpoints together, we can envision a world of contracts where the relationship is the central goal. Such a paradigm shift would inevitably have consequences for the rules of contract law. The next section examines the gendered history of fundamental contract doctrines and suggests ways that a reconceptualization of contract might change these doctrines.

II. THE RULES OF THE GAME

A. *The Gendered Nature of the Rules*

Apart from the domain of contracts, there is also an argument that the “rules of the game” are gendered, as well. Work has already been done on the gendering of legal rules in general, and the points made are equally applicable to

equality and in the sense of equality of opportunity, has been the focus of liberal feminism. As discussed in the text, relational or cultural feminism seeks to have the “feminine” accorded as much respect as the masculine historically has enjoyed; it advocates an “ethic of care” to supplement the traditional rights-based ethic that underlies much of law. Radical or dominance feminism has focused on how sexual hierarchies are reflected in law; this work has focused on issues like rape and sexual harassment. Critical or postmodern feminism has focused on issues of identity and epistemology, particularly by challenging dualistic thinking and categories.

60. Relational or cultural feminism in law owes much of its inspiration to Carol Gilligan’s work. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982). In particular, as part of her discussion of moral development, Gilligan contrasts the responses of “Jake” and “Amy” (Gilligan identifies these as two prototypical respondents to her survey) to the classic problem of Heinz’s dilemma. In Heinz’s dilemma, Heinz’s wife is deathly ill, and he cannot afford the medicine that will save her life. The question is posed: Should Heinz steal the drug? *See id.* at 25-26. Jake concludes that Heinz should steal the drug, because “life” ranks above “property” in his hierarchical, rights-based analysis. *See id.* at 26. Amy, however, fights the hypothetical and suggests that if Heinz explained the situation to the pharmacist, he could probably get the drug donated. *See id.* at 28-29. Gilligan labels Jake’s response “the logic of justice” and Amy’s response the “ethic of care.” *Id.* at 30.

61. I am unable to resist pointing out that not all feminists identify with relational or cultural feminism. *See, e.g.,* Margaret Jane Radin, *Reply: Please Be Careful with Cultural Feminism*, 45 STAN. L. REV. 1567 (1993). The closeness of the “ethic of care” to traditional conceptions of femininity gives rise to the critique that relational feminism replicates, in modern dress, the Nineteenth Century “separate spheres” ideology that enshrines the feminine as the guardian of morality, home and the family. *See* BARTLETT & HARRIS, *supra* note 1, at 2 (the “separate spheres” ideology defines a male sphere that is “public”—one concerned with the world of government, trade, business, and law—and a female sphere that is “private”—encompassing the realm of home, family and childrearing).

contract rules.⁶² The gendered nature of contract rules can be seen in the fundamental notion of freedom of contract and the resulting tension between freedom of contract and paternalism.

"Freedom of contract" is a fundamental underpinning of modern contract doctrine. In essence, "freedom of contract" includes two interrelated propositions: The first is that competent, autonomous individuals are entitled to enter into freely chosen⁶³ obligations with minimal interference from the state; and the second, which follows from the first, is that an individual should not have obligations imposed on him (or her) by the state. While ostensibly gender-neutral in its formulation, "freedom of contract" began as a sex-based concept.⁶⁴

The freedom of contract doctrine is commonly held to have begun with the dissenting opinions in the 1873 *Slaughter-House Cases*⁶⁵ "and these opinions are to be found in every modern constitutional law casebook."⁶⁶ In the *Slaughter-House Cases*, the four dissenters viewed the right to enter into employment contracts as protected under the Fourteenth Amendment.⁶⁷

Within one day of the decision in the *Slaughter-House Cases*, the Supreme Court decided the case of *Bradwell v. Illinois*.⁶⁸ *Bradwell* is, in essence, the female counterpart of the *Slaughter-House Cases*, although it is not part of the law school canon and is barely mentioned in casebooks.⁶⁹ In *Bradwell*, the majority held that the right to engage in a profession was not protected by the Fourteenth Amendment and thus upheld the denial of Myra Bradwell's

62. See Symposium, *supra* note 9.

63. "Freedom of contract" depends upon freely given consent: "[C]onsent is the overriding principle of freedom of contract." C.M.A. McCauliff, *Freedom of Contract Revisited: Johnson Controls*, 9 J. CONT. L. 226, 231 (1996). But consent is itself a problematic concept. Feminists, borrowing from earlier work regarding the idea of consent in rape law, argue that "consent" is more nuanced and debatable than many contemporary contract theorists imply. See Braucher, *supra* note 7, at 703-06 (arguing that consent is socially constructed in both rape law and contract doctrine: Rape law asks whether the man is justified in believing the woman consented, not whether the woman in fact consented; contract doctrine asks whether the party seeking enforcement of a deal is justified in believing the other party consented, not whether the other party in fact consented); Dalton, *supra* note 7, at 1005-06, 1028 & n.102 (arguing that, just as rape law, by drawing a line between acceptable and unacceptable force in sex, implicitly acknowledges that sex involves force, the duress doctrine, by drawing a line between acceptable and unacceptable coercion in contract negotiation, implicitly acknowledges that contracting involves coercion).

64. See Nancy S. Erickson, *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228, 232 (1989); McCauliff, *supra* note 63, at 227-28.

65. 83 U.S. (16 Wall.) 36 (1872).

66. Erickson, *supra* note 64, at 230.

67. *Id.* at 232. See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 83-130 (Field, Swayne, Bradley, JJ., Chase, C.J., dissenting).

68. 83 U.S. (16 Wall.) 130 (1873). See Mika, *supra* note 28, at 308.

69. See Erickson, *supra* note 64, at 230; Mika, *supra* note 28, at 306-08.

application for admission to the Illinois state bar.⁷⁰ This, of course, is consistent with the majority's opinion in the *Slaughter-House Cases*, which held that there was no constitutional protection for male workers to engage in lawful employment.⁷¹

It would have been consistent for the *Slaughter-House* dissenters to dissent in *Bradwell*, as well.⁷² However, three of the four *Slaughter-House* dissenters concurred with the majority in *Bradwell*.⁷³ Although they thought the right of *men* to engage in a chosen profession was protected by the Fourteenth Amendment, "the peculiar characteristics, destiny and mission of woman"⁷⁴ justified a state legislature in denying women access to a specific profession, such as law. "Freedom of contract" was something that men were entitled to, but not women.

The *Slaughter-House* dissents evolved into the majority in the 1905 decision *Lochner v. New York*⁷⁵ in which the Court struck down a state statute limiting (male) bakers to a ten-hour workday.⁷⁶ Three years later, the Court upheld a similar restriction on the workday of women laundry and factory workers in *Muller v. Oregon*.⁷⁷ Given the views of the *Slaughter-House* dissenters in *Bradwell*, that freedom of contract applied to men and not women, this result is not surprising. These two cases, however, point to a tension that continues to exist in contract doctrine today—the tension between autonomy and protectionism, between "freedom of contract" and "paternalism."⁷⁸ The two cases also suggest that these two contrasting notions can be thought of in gendered terms: "freedom of contract" being associated with the male gender and "paternalism" with the female gender.⁷⁹

70. *Bradwell*, 83 U.S. (16 Wall.) at 139.

71. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 67-83.

72. See Erickson, *supra* note 64, at 232.

73. *Bradwell*, 83 U.S. (16 Wall.) at 139, 142 (Bradley, Swayne, Field, JJ., concurring).

74. *Id.* at 142 (Bradley, J., concurring).

75. 198 U.S. 45 (1905).

76. *Id.* at 64-65.

77. 208 U.S. 412 (1908).

78. See Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOOD HALL L.J. 337 (1995); Kennedy, *supra* note 8, at 1725-37 (discussing how the indeterminacy of contract doctrine reflects the tension between the contradictory norms of self-centered individualism and paternalistic altruism); Mensch, *supra* note 7, at 759 ("Every doctrinal dispute within the classical model is reducible to conflicting claims of security and freedom."); Testy, *supra* note 7, at 228.

79. See *Rescuing Impossibility Doctrine*, *supra* note 6 (making a similar point in the context of impossibility). I admit to some disquiet with gendering "freedom of contract" and "paternalism" in this way, primarily because I am not convinced that it is helpful. I also acknowledge the irony of labeling "paternalism" as female gendered.

B. Reformulating the Rules

Pure and unadulterated "freedom of contract," unconstrained in any way by the state, does not exist, and probably never existed. The Constitution, for example, imposes a limit on freedom of contract: The Thirteenth Amendment prohibits even rational, autonomous rights-bearing individuals from contracting themselves into indentured servitude.⁸⁰ Certain types of contracts are or have been illegal in certain jurisdictions, such as gambling contracts or prostitution. Many contract doctrines are paternalistic in the sense of protecting the "weaker" or disadvantaged party: concealment, misrepresentation, unilateral mistake, undue influence, duress, unconscionability, minority, and lack of capacity all could be said to have a protectionist cast. Furthermore, the excuse doctrines (mutual mistake, impossibility, impracticability, and frustration of purpose) all could be described as paternalistic, with the court imposing its judgment about allocation of risks on the parties.

Feminists have just begun to question whether paternalistic doctrines like unconscionability help or harm women.⁸¹ At the same time, feminists are searching for ways in which contract doctrine could acknowledge that women historically have had less economic power than men.⁸²

The unconscionability doctrine, for example, traces its roots to *Williams v. Walker-Thomas Furniture Co.*⁸³ In that case, the court struck down a cross-collateralization clause that enabled the Walker-Thomas Furniture Company to repossess, in the case of a default, any and all items ever purchased on credit, even though the specific items repossessed had been paid for in full.⁸⁴ The plaintiff in the case is identified as a woman on welfare.⁸⁵

80. "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

81. See, e.g., Darren Bush, *Is Law & Economics a Useful Tool for Feminist Legal Theorists?: Law, Economics and Unconscionability* (1998) (unpublished manuscript, on file with author).

82. See, e.g., Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994). Brod argues that prenuptial agreements tend to have a disparate negative impact on women, stating that "most agreements will be to the advantage of the economically superior spouse (usually a man) at the expense of the economically weaker spouse (usually a woman)," *id.* at 239, and thus should be enforced only if the agreement attains economic justice or if the bargaining process was demonstrably fair. *Id.* at 294-95. See also Debora L. Threedy, "Breach of the Peace" in *Self-Help Repossession: Adopting a Gendered Perspective*, 7 COM. DAMAGES REP. 245 (1992) (borrowing the concept of "reasonable woman" from sexual harassment law and arguing that "breach of the peace," defined as force or the threat of force, has a gender element, as a reasonable woman could perceive the threat of violence in situations where a reasonable man might not feel threatened).

83. 350 F.2d 445 (D.C. Cir. 1965).

84. *Id.* at 450.

85. *Id.* at 448.

To the extent one accepts that the unconscionability doctrine is a paternalistic rule developed to protect poor women, the question arises whether such special rules help or hinder; or more accurately, do they help in the short run and hinder in the long run? For example, such special rules might lead to contracts with the protected groups being more expensive, due to the increased risk of being unenforceable. Thus, a possible consequence of such a doctrine could be to make credit purchases unavailable to women such as Mrs. Williams.

Analyzing the case using the paradigm of contract as a relationship, however, might lead to a conclusion that holds Walker-Thomas accountable, not because Mrs. Williams needs protection, but because the store violated the implicit terms of its relationship with her. To analyze the contract "relationally," it is necessary to understand how Walker-Thomas operated.

Walker-Thomas' market niche was selling furniture and household appliances to the economically underprivileged; most of their customers were on welfare.⁸⁶ Walker-Thomas' selling strategy was based primarily on door-to-door sales: Salesmen called upon potential customers in their homes and encouraged these potential customers to see them as "friends." The salesmen regularly cashed their customers' welfare checks, saving the welfare recipient from having to pay a fee to the currency exchange (where welfare checks are often cashed) as well as from the potentially risky trip back from the currency exchange with a month's living expenses in their pockets.⁸⁷ On occasion, the salesmen would even give small, inexpensive gifts to regular customers.⁸⁸ They knew their customers, and their children, by name.

The contractual relationship between Walker-Thomas and its customers suggests that *Williams* could be thought of as a case involving a breach of good faith and solidarity (to use Macneil's term for trust and cooperation). Having created a relationship that incorporated elements of a social (nonmarket) relationship, Walker-Thomas could not then revert to a cold and calculating, purely market relationship.⁸⁹

Another consequence of the new paradigm might be that inequality of bargaining power (what Macneil calls mutuality) becomes a factor in contract doctrine. Contract law, by and large, takes no account of inequality of bargaining power between contracting parties. The justification is that to do otherwise, to allow the party with inferior bargaining power to challenge the contract after the fact, would in the long run make it more difficult for such parties to contract. Parties with superior bargaining power would be disinclined to contract with

86. See David I. Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, in *NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM* 380-91 (Laura Nader, ed. 1980); see also Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching v. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 *HOUS. L. REV.* 575, 578-82 (1989).

87. See Greenberg, *supra* note 86, at 382.

88. See *id.* at 383.

89. See Macaulay, *supra* note 86, at 581 n.30 (suggesting Walker-Thomas created a "fictive friendship").

weaker parties, because the weaker party could later use their inferior position as an excuse to avoid the contract or its terms.

Inequality of bargaining power, however, does affect contract doctrine in all sorts of indirect ways. Power imbalances can trigger the doctrines of duress and unconscionability, although both require "something more" than the mere fact of such imbalances. Moreover, the doctrines of undue influence, infancy, and lack of capacity all could be said to have a component based upon inequality of bargaining power.

A relational contract doctrine could more explicitly recognize the ways in which an inequality of bargaining power can subvert the bargaining process.⁹⁰ For example, contract clauses could be subject to a two-tiered scrutiny by a reviewing court.⁹¹ One level of scrutiny, extremely deferential to the parties' bargain, would apply when the parties were determined to be of relatively equal bargaining power. Another, stricter level of scrutiny would apply in situations where equality was lacking, as in contracts of adhesion.

A relational contract paradigm also could lead to new ways of allocating risk in contract. Excuse doctrines—mutual mistake, impossibility, impracticability, frustration of purpose—deal with the allocation of risks unknown at the time of contracting. These doctrines, however, tend to operate as an all-or-nothing principle: If the buyer, for example, is allocated the risk, all losses flowing from the occurrence of the risk will fall on the buyer. A relational contract approach, however, could recognize that, in many ventures, the parties implicitly share risks and could formulate rules (perhaps analogous to comparative negligence rules in tort) for sharing the losses.⁹²

If the foundation of contract law shifts from a focus on the things contracted for to the relationship between the contracting parties, we could see contract doctrine becoming more responsive to different kinds of contracts and to the differences between contracting parties.

CONCLUSION

We are on the brink of a new millennium: A good time to be looking back and taking stock. The last hundred years have seen revolutionary changes in the lives of women. We've come a long way, but full and equal participation in public, economic and political life still eludes us. That should not surprise or depress us, however; a hundred years is not enough time to change thousands of years of gender-based inequality.

90. See, e.g., McCauliff, *supra* note 63, at 233 (discussing how relational contract theory might affect who should bear the cost of providing workers with a safe workplace).

91. See, e.g., Debora L. Threedy, *Liquidated and Limited Damages and the Revision of Article 2: An Opportunity to Rethink the U.C.C.'s Treatment of Agreed Remedies*, 27 IDAHO L. REV. 427, 460 (1990-91) (arguing that contractual remedies provisions should be subjected to a two-tiered judicial review).

92. My thinking on this, while tentative at this time, was inspired by a discussion about allocation of risk with my colleague, Terry Kogan.

The legacy of those thousands of years of inequality is imbedded deep within the structures of our civilization. It is embedded in law; it is embedded in contract law. The deeply embedded legacy of inequality must be recognized before it can be changed.

Recognition opens the door to change. A large part of the work of feminists so far has been aimed at bringing about that recognition. Whether fundamental change occurs in the deeply embedded structures of inequality, and what that change may be, is the work of the next millennium.

ON MIRRORS AND GAVELS: A CHRONICLE OF HOW MENOPAUSE WAS USED AS A LEGAL DEFENSE AGAINST WOMEN

PHYLLIS T. BOOKSPAN*
MAXINE KLINE**

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DEDICATION

In the Fall of 1992, Maxine Klein took a seminar on Gender and the Law

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with me. She was fifty-one years old at the time, an accomplished mother and a professional fine art collector and dealer. When I discussed topic selection for seminar papers, I encouraged all students to write about something they felt passionately about. Maxine asked me if she could write about menopause. Initially I was skeptical of how she could relate menopause to a legal issue, so I asked her to do some preliminary research and submit it to me. A week later, Maxine came into my office and left on my desk a two inch stack of legal cases raising issues surrounding menopause. I approved her topic.

After reading Maxine's completed seminar paper I became convinced that she had uncovered a story that needed to be told to a broader audience. I suggested that we collaborate on an article for publication, and we did some preliminary work together. In May 1993, Maxine graduated from law school and moved on, and I filed the paper away. A little over a year later, Maxine died from a sudden brain aneurysm. To the best of my knowledge, Maxine became absorbed in the details of a law practice and never went back to the paper before her untimely death. And for five years I didn't open my file drawer.

Maxine uncovered a good story—a story that she wanted told. *On Mirrors and Gavels—A Chronicle of How Menopause Was Used as a Legal Defense Against Women* is dedicated to Maxine Klein, as a tribute to her vitality for life and her passion for uncovering injustice. I hope that I have done justice to her ideals.

INTRODUCTION

*If you believe that the plaintiff is nervous, and that the condition is not the direct result of the accident, but is brought on by her own actions, or is the material condition liable to women at about her age—change of life—then no damages can be allowed for that condition if you should find for the plaintiff.*¹

Anna Laskowski was standing on the sidewalk accompanied by her young daughter when a runaway horse and ice wagon jumped the curb.² Mrs. Laskowski ran into a neighboring yard in an attempt to protect herself and her child.³ The frantic horse, however, followed her into the yard and knocked her down. Anna Laskowski was run over by the wheels of the ice wagon owned by People's Ice.⁴ She was seriously injured.⁵ Her chest was crushed, her collar bones and two ribs were broken, her shoulder was dislocated and her neck, head, and knee were strained and bruised.⁶ The physician who examined Mrs.

1. Laskowski v. People's Ice Co., 157 N.W. 6, 8 (Mich. 1916) (emphasis added) (repeating the defendant's request for jury instructions).

2. See *id.* at 7.

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

Laskowski at the accident scene testified, "I found the woman nearly dead."⁷ Mrs. Laskowski sued for injury, her pain and a resulting chronic nervous condition called traumatic neurasthenia.⁸ The jury found, and the appellate court agreed, that the horse that ran away was unruly, nervous, fractious and excitable, and he was being driven with a bridle that was too large.⁹ Mrs. Laskowski was awarded \$3500.¹⁰ On appeal, People's Ice argued that the award was excessive because Anna Laskowski's injuries were "practically repaired" from the usual healing process, and it was more reasonable to believe that Mrs. Laskowski's nervous condition "resulted from the menopause, or change of life, which comes to all women at or about a certain age"¹¹ Contrary to the defendant's argument, the Michigan Supreme Court found that Mrs. Laskowski's evidence of loss of earnings and permanent loss of capacity to earn in the future plus her pain and suffering were sufficient to sustain a damages award greater than what she received.¹² Yet, before dismissing the defendant's contention that Mrs. Laskowski's injury was attributable to her age and hormone levels, the court obligingly wrote that the defendant failed to prove that the physiological change of menopause had yet "come to the plaintiff."¹³ With no discussion whatsoever about what menopause is, or the admissibility and propriety of a defense based upon a woman's hormone levels and natural physiological state, the Michigan Supreme Court recognized that menopause, if proved, could be a valid defense in a personal injury case.

The idea that "change of life" or menopause is a time of mental and physical derangement for women seemed to be something that the court just knew. Indeed, by noting *only* that the defendants failed to prove that the physical change had come to Mrs. Laskowski, the court implicitly assumed a deficiency/disease model of the group of symptoms that may occur together at menopause.¹⁴ In fact in 1916, the year *Laskowski* was decided, accurate research barely existed about the female ovulatory system and the physical and other changes associated with the natural process that all women experience.¹⁵ Indeed,

7. *See id.*

8. Neurasthenia refers to "a syndrome of chronic mental and physical weakness and fatigue, which was supposed to be caused by exhaustion of the nervous system" while traumatic neurasthenia refers to neurasthenia following shock or injury. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1127 (28th ed. 1994) [hereinafter DORLAND'S DICTIONARY].

9. *See Laskowski*, 157 N.W. at 7.

10. *See id.*

11. *Id.* at 8.

12. *Id.*

13. *Id.*

14. *Id.*

15. The processes of menstruation and menopause were not adequately explained until 1920 when the sex hormones were discovered. Prior to that speculations were "totally inaccurate yet titillating in their florid weirdness." Susan E. Bell, *Changing Ideas: The Medicalization of Menopause*, in THE MEANINGS OF MENOPAUSE HISTORICAL MEDICAL AND CLINICAL PERSPECTIVES XV 43, 45-46 (Ruth Formanek ed., 1990) [hereinafter THE MEANINGS OF MENOPAUSE].

even today, researchers are divided on the medical characterization of menopause as disease or normal physiological change.¹⁶ Yet, for the Michigan Supreme Court, there seemed to be no need to investigate or prove either characterization. Attentive defense attorneys took notice; and with varying degrees of success, for the next seventy years or so, menopause found its way into American jurisprudence. This Article tells the story of the rise and fall of this unique defense in American law. For lack of a more artful term, we call it the "menopause defense."

A. *What is the Menopause Defense?*

The menopause defense, which emanates from symptoms commonly associated with the medical and socio-cultural habit of labeling all symptoms at mid-life "menopausal,"¹⁷ pre-dates modern syndrome type defenses such as rape trauma syndrome,¹⁸ post-partum depression, pre-menstrual syndrome,¹⁹ and

16. See generally Madeline J. Goodman, *The Biomedical Study of Menopause*, in THE MEANINGS OF MENOPAUSE, *supra* note 15, at 133, 148-52.

17. Menopause is defined as the "cessation of menstruation in the human female, occurring usually around the age of 50." DORLAND'S DICTIONARY, *supra* note 8, at 1006. Menopause prae'cox is the "premature failure of ovulation, possibly due to primary germ cell deficiency, acquired refractoriness to pituitary gonadotropin, or autoimmunization." *Id.* "Climacteric the syndrome of endocrine, somatic, and psychic changes occurring at the termination of the reproductive period in the female (menopause); it may also accompany the normal diminution of sexual activity in the male. Called also *climacterium*." *Id.* at 345.

18. These controversial syndrome defenses only gained legal recognition in the courts after long-fought battles over their admissibility. See, e.g., *Illinois v. Wheeler*, 602 N.E.2d 826 (Ill. 1992) (holding that evidence of rape trauma syndrome, a subcategory of post traumatic stress disorder, is only admissible if the defendant has fair opportunity to challenge the evidence); *State v. Lawrence*, 541 N.E.2d 451, 455 (Ohio 1989) (stating evidence that a defendant suffered from post traumatic stress disorder is relevant to his ability to formulate intent to murder). But see, e.g., *State v. Alberico*, 861 P.2d 219 (N.M. Ct. App. 1991) (stating that a diagnosis of rape trauma syndrome does not prove cause of symptoms and therefore may not be admitted to prove that victim-witness was raped); *Commonwealth v. Gallagher*, 547 A.2d 355 (Pa. 1988) (holding that expert testimony on rape trauma syndrome was inadmissible for purpose of enhancing credibility of rape victim); *State v. Black*, 745 P.2d 12 (Wash. 1987) (holding expert testimony on rape trauma syndrome as a means of proving lack of consent in a rape case is improper).

19. See, e.g., Robert Mark Carney & Brian D. Williams, *Criminal Law—Premenstrual Syndrome: A Criminal Defense*, 59 NOTRE DAME L. REV. 253 n.3 (1983); Lawrence Taylor & Katharina Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 CAL. W.L. REV. 269 (1983); Marcia Baran, Comment, *Postpartum Psychosis: A Psychiatric Illness, A Legal Defense To Murder, Or Both?*, 10 HAMLINE J. PUBL. L. & POL'Y 121 (1989); Lori A. Button, Comment, *Postpartum Psychosis: The Birth of a New Defense?* 6 COOLEY L. REV. 323 (1989); Amy L. Nelson, Comment, *Postpartum Psychosis: A New Defense?*, 95 DICK. L. REV. 625 (1991); Marc P. Press, Note, *Premenstrual Stress Syndrome as a Defense in Criminal Cases*, 1983 DUKE L.J. 176 (1983).

battered women's syndrome.²⁰ Moreover, unlike modern syndrome defenses, which typically are asserted by female defendants in criminal actions either to explain, justify or excuse acts or to mitigate punishment,²¹ the menopause defense was used primarily by defendants against female plaintiffs in civil actions. The menopause defense is a creation of a civil defense bar that seized upon a cultural stereotype of aging women and prevailing sexist norms.²² The defense predominantly was asserted by men, in male dominated courtrooms, to devalue female plaintiffs, cast blame upon them, and attempt to deny women compensation or other remedies.²³

20. See, e.g., *Lentz v. State*, 604 So. 2d 243 (Miss. 1992) (holding evidence that defendant was battered by the victim is relevant if it assists the jury in understanding the facts of the case); *Commonwealth v. Dillon*, 598 A.2d 963 (Pa. 1991) (holding that in a self-defense case, evidence that defendant is a battered woman is admissible to help jury assess the reasonableness of her fear).

21. See, e.g., *Richter v. Connor*, 21 F.3d 423 (4th Cir. 1994) (pre-menstrual syndrome defense); *California v. Massip*, 271 Cal. Rptr. 868 (Cal. App. 1990) (post-partum defense); *Willgerodt v. Horhri*, 953 F. Supp. 557 (S.D.N.Y. 1997) (post-partum defense); *Commonwealth v. Egrass*, 595 A.2d 789 (Pa. Commw. Ct. 1991) (pre-menstrual syndrome defense). See also *Reid v. Florida Real Estate Comm'n*, 188 So. 2d 846, 855 (Fla. Dist. Ct. App. 1966) (holding that the defendant's mental condition—the change of life—prevented her from acting rationally and thus, she should not be punished). And see *infra* note 23.

22. We call this a cultural stereotype because the language of medical and psychological writings and studies reveal cultural images of menopause as a time of stress, breakdown, decline, regression and decay of women. For example, the following quote is representative of descriptions we found repeatedly: "[T]he way in which the menopause has been written about by predominantly male doctors who describe 'vaginal atrophy,' 'degenerative changes,' 'estrogen starvation,' and 'senile pelvic involution' conditions women to see each sign of the menopause as a stigma by which they are labeled as aging and 'past it.'" RHODA UNGER & MARY CRAWFORD, *WOMEN AND GENDER: A FEMINIST PSYCHOLOGY* 503 (1992) (citing S. KITZINGER, *WOMEN'S EXPERIENCE OF SEX* (London: Dorling Kindersley 1983)). "[M]enopause is the trigger for the powder keg of emotions slowly smoldering somewhere in the hypothalamus." E. Dunlop, *Emotional Imbalances in the Premenopausal Woman*, 9 *PSYCHOSOMATICS* 44, 45 (Supp. 4 1968).

However, an anthropological study based upon actual interviews and observation of mid-life women found relatively little distress. Over and over women reported: "It was nothing;" "Nothing, never had any problem, it just stopped, it slowed up;" and "Nothing. Just stopped and that's about it." EMILY MARTIN, *THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION* 173 (1987).

23. Occasionally, a woman did assert menopause as a defense. For example, in *Reid*, 188 So. 2d at 855, the Florida Real Estate Commission attempted to revoke Kathleen Reid's real estate license after she was caught stealing a \$3.08 steak from a Winn Dixie. Although, Ms. Reid was not prosecuted for the crime, the Commission voted to suspend her license for "dishonest dealing." On her behalf, two doctors testified that Kathleen Reid was suffering anxiety, stress, and tension, and that she was experiencing "the change of life." One of her experts testified "that the taking of the steak was an isolated-behavior incident produced by her menopause state." *Id.* at 855. See also *In re Grants Estate*, 47 P.2d 508, 509 (Cal. 1935) (explaining that the daughter of a decedent argued that the decedent, who eliminated the plaintiff and her siblings from her will, had suffered "a mental

The essential premise of this defense was that a woman approaching mid-life was either mentally ill, physically ill or both.²⁴ It was a manifestation of two pervasive negative stereotypes of sexism and ageism. Crafty defendants attempted to exploit these social and cultural "isms" to cast female plaintiffs in a negative light and try to persuade courts and juries that the woman suing them was already a damaged person and thus entitled to little or no recovery. For example, a woman spent thirty-one days in a hospital as a result of injuries sustained in an auto accident. Yet, when she sued the driver for negligence, she found the defendant attempting to deny liability by claiming that the plaintiff's injuries were due to menopause.²⁵

In another case, a defense medical witness testified that the female plaintiff's physical and emotional distress were related to her menopause rather than the emergency landing of the airplane in which she had been traveling.²⁶

In a case documenting that a rusty, used, razor blade was in a bottle of soda the plaintiff ingested, defendant, Pepsi-Cola Co., unabashedly claimed that plaintiff's digestive problems and vomiting were due to her menopause rather than to the contaminated Pepsi that she drank.²⁷

A 1941 divorce case also is representative of the thinking of courts during the heyday of the menopause defense. An Ohio Court of Appeals reviewing a petition for divorce, upheld both the denial of the wife's divorce petition on grounds of cruelty that arose from her husband's excessive drinking, and the divorce grant to the husband on grounds of extreme cruelty that he blamed on his

disturbance occasioned by her period of menopause"); *Wiley v. Wiley*, 190 A. 363, 366 (Pa. 1937) (explaining acts in divorce proceedings as based upon her "undergoing her menopause").

24. See, e.g., *Fox v. Capital*, 96 F.2d 684, 685 (3rd Cir. 1938) (discussing plaintiff's "menopausal insanity"); *Tate v. Western Union Tel. Co.*, 96 S.W.2d 364 (Mo. 1936) (stating plaintiff is at age of menopause, a condition that is accompanied by nervousness); *Hanson v. City Light & Traction Co.*, 178 S.W.2d 804, 808 (Mo. App. 1944) (attributing the plaintiff's symptoms to her menopause); *Maryland Cas. Co. v. Davis*, 464 S.W.2d 433 (Tex. App. 1971) (explaining defendant's argument that menopause was the cause of the plaintiff's keratoconjunctivitis); *City of Beaumont v. Wiggins*, 136 S.W.2d 260 (Tex. App. 1940) (alleging that plaintiff failed to recover properly due to menopause or other conditions); *Lunt v. Lunt*, 121 S.W.2d 445, 446 (Tex. App. 1938) (divorcing husband filed lunacy charges against wife). But see *Shilling v. State Accident Ins. Fund*, 610 P.2d 845 (Or. App. 1980) (stating menopause not related to plaintiff's emotional disability). See also discussion *infra* Part III.

25. See *Alderman v. Kelly*, 32 A.2d 66, 67 (Conn. 1943) (referring to the defendant's claim that the plaintiff's physical injury was related to menopause rather than the collision of their automobiles); see also discussion *infra* notes 151-57.

26. *Leasman v. Beech Aircraft Corp.*, 121 Cal. Rptr. 768, 769 (Ct. App. 1975).

27. *Day v. Rains*, 220 S.W.2d 575, 576 (Ky. 1949). See also *Hollis v. Ouachita Coca-Cola Bottling Co.* 196 So. 376, 378 (La. Ct. App. 1940) (testifying doctor stated that woman who swallowed parts and poison of Black Widow spider found in bottle of Coca-Cola had symptoms due to menopause, and that "a normal individual should be over the effects in a week"); *Laurel Coca Cola Bottling Co. v. Hankins*, 75 So. 2d 731, 733 (Miss. 1954) (testifying expert stated that plaintiff was ill from menopause not from drinking sulfuric acid in a bottle of Coke.).

wife's menopause.²⁸ While the appeals court did not disturb the decree of divorce granted by the lower court to the husband, it did modify the property division in favor of the wife because: "It is evident from the record, and it is common knowledge, that women who are passing through the menopause require the most kindly and considerate treatment and that at times they are petulant, act irrationally and in an immoderate manner."²⁹

As recently as 1984, a defendant attempted to benefit from the negative stereotypes associated with middle aged women. A female plaintiff who suffered severe headaches, muscle spasms, elevated blood pressure, cardiac problems and back pain after she was trapped inside her automobile after it was demolished by the defendant's truck, found the defendant asserting that the plaintiff's injuries were due to menopause related depression, not the trauma she experienced from the accident.³⁰ These cases typify how the denormalization of menopause enabled lawyers to use menopause as a strategy to devalue women, reduce damage awards or otherwise affect case outcomes.

B. The Menopause Defense as a Manifestation of Gender Discrimination

The history of gender based discrimination, particularly in the courtroom, is not new, and others have told aspects of that story.³¹ Recent feminist legal writings, although diverse in approach and perspective, share the general

28. Pearson v. Pearson, 41 N.E.2d 725 (Ohio Ct. App. 1941).

29. *Id.* at 727.

30. Hayes v. Commercial Union Assurance Co., 459 So. 2d 1245 (La. Ct. App. 1984). *See also* Devillier v. Traders & General Ins. Co., 321 So. 2d 55 (La. Ct. App. 1975) (attributing plaintiff's emotional and physical injuries to menopause rather than automobile accident); McCommon v. Hennings, 283 N.W.2d 166 (N.D. 1979) (finding plaintiff's injuries resulting from a rear end collision were related to menopausal melancholia).

31. *See generally* Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2192 (1993) (reporting, based upon responses to the Ninth Circuit Gender Bias Task Force Report, among other things, that men will refer to a woman attorney as "bitch" when she takes a position that would be termed as aggressive and positive in a male, and that female attorneys reported being called menopausal or asked if they were suffering from pre-menstrual syndrome when they objected to judges' rulings); *see also* Mark Hansen, *9th Circuit Studies Gender Bias—Survey Finds 60 Percent of Female Lawyers Sexually Harassed in Last Five Years*, 78 A.B.A. J. 30 (1992); Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 STAN. L. REV. 1525, 1532-33 (1993) (concluding from various task force conclusions that "[w]omen uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility . . . [and t]here is evidence that bias does occur with disturbing frequency at every level"); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991) (reporting on the conclusions of the New York Task Force on Women in the Courts that gender bias against women is a pervasive problem that has grave consequences including daily distortions in courts' application of substantive law and that it is unlikely that the federal judiciary is totally exempt from instances of this general societal problem).

objective of raising questions about women's relationship to law and legal institutions.³² Much of the literature explores the many aspects of the role that law plays and has played in subordinating women in our society.³³ For example, Professor Martha Chamallas has documented how the hidden biases of tort law have created an inequality in damage awards for women and plaintiffs of color. In particular, she reveals how reliance upon statistical data premised explicitly on race and sex to calculate loss of earnings capacity creates a financially neutral yet practically discriminatory basis for damages.³⁴

Other studies also have explored less overt forms of legally sanctioned devaluation of women.³⁵ The menopause defense, however, was neither subtle nor subconscious. It was an overt, bold and accepted means to devalue women's injuries, damages, and life worth. The impressive body of legal discourse on differential treatment of women includes virtually nothing about the disturbing history of how this defense was used in legal proceedings to perpetuate differences and promote discrimination against women. This Article documents the development and use of this unique defense in American courts.

The first recorded attempt to use menopause as a defense to limit or deny recovery to a female plaintiff occurred in 1900.³⁶ For the next eighty or so years, the defense waxed and waned.³⁷ In 1980, the American Psychological

32. For good compilations of recent feminist legal thought, see generally, AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THOUGHT (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) [hereinafter BOUNDARIES OF LAW]; FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katherine T. Bartlett & Roseann Kennedy eds., 1991); FOUNDATIONS: FEMINIST LEGAL THEORY (D. Kelly Weisberg ed., 1993); Christine A. Littleton, *Whose Law is this Anyway?*, 95 MICH. L. REV. 1560 (1997) (reviewing cited casebooks on women and law).

33. See, e.g., Christine A. Littleton, *Reconstruction Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (discussing different sexual equality models and whether any of them meet the goal of ending women's subordination); Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985) (discussing the types of inquiries that comprise what is loosely called feminist jurisprudence or legal scholarship about women).

34. Martha Chamallas, *Questioning the Use of Race-Specific and Gender Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994). See also Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990) (documenting the legal tendency to connect women to emotional injury, even when the injuries have severe physical consequences).

35. See, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (revealing how inherent social structures, such as privileging physical harm over relational harm, devalues women and minorities); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury 1870-1920*, 19 L. & SOC. INQUIRY 369 (1994) (assessing the role of gender in shaping the law of accidental injury).

36. *San Antonio Gas Co. v. Singleton*, 59 S.W. 920 (Tex. Civ. App. 1900). See *infra* notes 102-03 and accompanying text.

37. The greatest number of cases is found in the 1940s, with 16 reported appellate decisions. Because our research was limited only to appellate records, these numbers do not reflect the actual number of times the defense was asserted at the trial level.

Association dropped involuntional melancholia (the diagnostic label given the body of symptoms commonly associated with menopause) as a diagnosis from its *Diagnostic and Statistical Manual* ("DSM"),³⁸ and without the benefit of easily admissible medical testimony about the emotional and psychological ills of menopause, the defense essentially disappeared from the legal scene.³⁹

In chronicling actual stories of the usage of the menopause defense, this Article unveils a part of the history of our American judicial system that has not yet been told. The Article also highlights an integral connection between the medical community's interest in menopause as a disease and the legal community's success with the defense. Further, the cases discussed raise the question of whether the perception of women is constructed by the legal gavel, or whether law, like a mirror, reflects the conceptualizations and conclusions of the dominant culture. We tell these stories as an effort to present richly detailed encounters between women and the law, and document by concrete example the extent to which our legal system participated in perpetuating a culture that undermined and devalued older women.

I. THE MENOPAUSE TABOO

Until recently almost no one talked about menopause—or so we were led to believe. The term itself first was coined in 1821. Prior to that the more correct expression "climacteric" from the Greek work *klimacter* meaning "critical period" was used.⁴⁰ Regardless of the term, however, women⁴¹ generally did not

38. AMERICAN PSYCHIATRIC ASSOC., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1987).

39. Modern critics of the medical establishment suggest that involuntional melancholia is a condition that never existed. The diagnosis was so broad that it "was possible to interpret virtually any emotional or physical complaint made by a midlife woman as stemming from the menopausal neurosis she was suffering." SANDRA CONEY, *THE MENOPAUSE INDUSTRY: HOW THE MEDICAL ESTABLISHMENT EXPLOITS WOMEN* 68 (1994). Older medical sources are firm in viewing a connection between involuntional melancholia from menopause and mental and emotional dysfunction. See, e.g., Richard P. Brown et al., *Involuntional Melancholia Revisited*, 141:1 AM. J. PSYCHIATRY 24 (1984); August Hoch & John T. MacCurdy, *The Prognosis of Involuntional Melancholia*, 7 ARCHIVES OF NEUROLOGY & PSYCHIATRY 1 (1922); Myrna M. Weissman, *The Myth of Involuntional Melancholia*, 242 JAMA 742 (1979). See also discussion *infra* at note 48.

40. See GERMAINE GREER, *THE CHANGE* 22-23 (1992). Climacteric and menopause were defined at the First International Congress on the Menopause held in France in 1976. According to the consensus at the conference, climacteric refers to the phase of the aging process in women that marks a transition from reproductive to non-reproductive life. Menopause marks the final menstrual period, and takes place during the climacteric. See Elizabeth Henrik, *Neuroendocrine Mechanisms of Reproductive Aging in Women and Female Rats*, in *CHANGING PERSPECTIVES ON MENOPAUSE* 100, 102 (Ann M. Voda et al. eds., 1982).

41. Throughout the Article, we discuss women and men generically for lack of a better and less cumbersome way to make the distinctions we must. Our goal is not to reduce all women to one trait, viewpoint, stereotype or medical model, and we recognize that at times we may be susceptible

discuss this phase of life with their families or friends for fear that they would be perceived as unhealthy, crazy, or worst of all—old.⁴² Menopause was, as author Gail Sheehy terms it, *The Silent Passage*—“one of the most misunderstood passages in a woman’s life.”⁴³ Feminist Germaine Greer speculates that women may not speak of menopause for one of two reasons: 1) cultural perceptions have forced them into denial; or 2) for most it is a non-event, with none of the significance attributed to it by men.⁴⁴ But, while most women shunned the topic, it did not elude others—particularly defendants in personal injury actions. Moreover, following its implicit acceptance in *Laskowski v. People’s Ice Co.*,⁴⁵ lawyers, judges, spouses and even employers learned to talk openly about menopause when it was to their advantage as a means to limit and control the

to “essentialism”—that is reducing the many different races, classes, ethnicities, religions and other qualities that make the groups “women” and “men” into one universal. With our broad oversimplification of the categories “women and men,” certainly we do not intend to suggest that all women experience climacteric the same nor that all were “passive victims” and remained silent about menopause, nor that all men did or would use menopause to demean women or deny them certain rights. For a fuller discussion of the definition of essentialism and the dangers of reductionist thinking, see generally, MARTHA MINNOW, NOT ONLY FOR MYSELF 34 (1997); Martha Minnow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

42. Women’s fear of aging is pervasive in popular Western society. Denial of age is reflected in everything from advertisements for face lifts, to breast implants and cosmetics, to television shows and movies that depict older people as helpless, sexless and mindless. Feminist author Betty Friedan writes: “[T]he mystique of age was much more deadly than the feminine mystique, more terrifying to confront, harder to break through.” BETTY FRIEDAN, *THE FOUNTAIN OF AGE* 42 (1993).

43. GAIL SHEEHY, *THE SILENT PASSAGE: MENOPAUSE* 8 (1991).

Menopause must be one of the most misunderstood passages in a woman’s life. One study showed that two thirds of all American women say nothing to anybody as they approach what may be a distressing and even fearsome Change. But who can blame us? Menopause is inextricably linked with middle age. In the youth-oriented societies of North America and Europe, even the mention of middle age has a stigma about it. Shame, fear, and misinformation are the vague demons that have kept us silent about a passage that *could not be more universal among females*.

Id.

44. GREER, *supra* note 40, at 19.

Women are not given spontaneously to describing their own menopause experiences; women writers, memorists, bellettrists, diarists, novelists, poets, rarely so much as hint at menopause as an event. In the vast majority of cases women do not see the climacteric as a factor in their development. It seems unlikely that what we are up against is lack of awareness or lack of insight, and only slightly more likely that we are contemplating the more sinister phenomenon of denial. If the denial is simply denial of a male construction of a female event, it is only proper; if it is denial of the event itself, it is neurotic.

Id.

45. 157 N.W. 6 (Mich. 1916).

recovery of damages by injured female plaintiffs.

A. Myths, Mystery and Misinformation: Historical Overview

Menopause, literally the time when menstruation ceases, is the term that loosely categorizes the hormonal changes that a woman's body undergoes from about thirty-five until the early to mid-fifties.⁴⁶ It may occur as a part of the normal aging process or result from the surgical removal of the ovaries, the uterus or both of these reproductive organs.⁴⁷ Menopause also may be pharmacologically induced or result from irradiation.⁴⁸ It has been a fact of life from the time the first woman's life span extended past the age of forty.⁴⁹ Yet, what menopause is and how it should be treated has been cloaked in silence, myth, mystery, and misinformation.⁵⁰

46. See DORLAND'S DICTIONARY, *supra* note 8, at 1006. In the Nineteenth Century menstruation was seen as a pathological change, a manifestation of a general systemic disturbance with local histological changes. And so "menstruation was consistently seen as pathological, menopause, another function which by this time was regarded as without analogue in men, often was too[and] many nineteenth-century medical accounts of menopause saw it as a crisis likely to bring on an increase of disease." MARTIN, *supra* note 22, at 35 (citing Carol Smith-Rosenberg, *Puberty to Menopause: The Cycle of Femininity in Nineteenth-Century America*, in CLIO'S CONSCIOUSNESS RAISED 23, 30-31 (1974)).

47. See DORLAND'S DICTIONARY, *supra* note 8, at 1006.

48. See Alan E. Treloar, *Predicting the Close of Menstrual Life*, in CHANGING PERSPECTIVES ON MENOPAUSE, *supra* note 40, at 289. As late as the 1988 edition of *Dorland's Illustrated Medical Dictionary*, published eight years after the American Psychiatric Association removed involuntional melancholia occurring at menopause from its list of recognized psychiatric disorders, referenced psychiatric changes occurring at menopause. However, our research has uncovered no scientific foundation for the inclusion of psychiatric changes in the definition of menopause or climacteric.

49. In the Twentieth Century, life expectancy moved from 46 to nearly 80. The fastest growing segment of the population is now people over 80, most of them women. While all members of the population are living longer due to better nutrition, disease control and advances in medicine, older women are outliving older men. See KEVIN KINSELLA & CYNTHIA M. TAEUBER, U.S. DEP'T OF COMMERCE, AN AGING WORLD II 22 (1993). A recent study of African hunter-gatherers led to a "grandmother hypothesis" for why women are living longer. According to the study, natural selection favors menopause so that grandmothers can ensure the survival of their grandchildren. Grandmothers have the time to provide for grandchildren, while their daughters have the time to have more offspring and take care of infants. See Ann Gibbons, *Ideas on Human Origins Evolve at Anthropology Gathering*, 276 SCIENCE 535, 536 (1997).

50. For example, in the early Twentieth Century the following treatments for menopause were commonly employed:

Treatment [for menopause].—1. . . . Above all keep the bowels open. For the sediment in the urine it is well to drink Vichy or Seltzer water freely during the day; or to take half a teaspoonful of bicarbonate of soda in a tumblerful of water in the course of the day.

At times, everything from congestion of the liver to trembling of limbs was attributed to this natural womanly function.⁵¹ At worst, menopause is labeled a disease and shrouded in fear. At best, menopause becomes a catch-all for all the physical and emotional problems of women between the ages of forty and fifty-

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2. The congestion of the head and the disturbances of vision are relieved by hot foot baths, with or without mustard, and of the cold water eye douche five minutes three times daily.
 3. Lukewarm general baths taken three times a week will keep the skin in good condition
 4. Those women who have a tendency to stoutness should adhere to a restricted diet Milk and beer are prohibited.
 5. The few women who lose flesh must be well fed, and have chocolate and plenty of milk to drink
 6. A sudden suppression of the flow during this period is particularly dangerous, hence she should avoid getting the feet wet, wet skin, and should not take a cold bath nor wash the privates with cold water. . . .
 7. If hemorrhages occur employ the remedies advocated for the treatment of menorrhagia and metrorrhagia.
 8. If the bleeding is quite profuse, pack clean pieces of linen tightly in the vagina, and allow them to remain until a physician is consulted, which should be immediately. This method of packing the vagina will control the bleeding until the physician arrives and institutes more radical measures. A good uterine tonic such as the *pil viburnum comp.* often does much to relieve the nervous condition and allay pain and distress.

LIBRARY OF HEALTH, COMPLETE GUIDE TO PREVENTION AND CURE OF DISEASE 680-81 (B. Frank Scholl ed., 1916).

These relatively moderate remedies for menopause were replaced by the early 1920s. Electro shock therapy consisting of six to nine treatments, forced tube feedings, drug therapy, occupational therapy, hydro-therapeutic measures and confinement to asylums all found favor with, and were used by, the medical establishment. *See, e.g.,* SIR DAVID KENNEDY HENDERSON & R.D. GILLESPIE, A TEXT-BOOK OF PSYCHIATRY FOR STUDENTS AND PRACTITIONERS 295, 298 (1956) (describing forms of treatment widely considered appropriate in 1956).

In 1997, prescription drugs to treat menopause were predicted to constitute the largest market among the baby boomer generation. The hormone replacement drug market generated \$1.2 billion in 1996 and is projected to increase to \$5.04 billion in 2006. *See Aging Boomers Provide Facelift*, INDUS. IN TRANSITION, June 1, 1997, available in 1997 WL 9285841.

51.

There may be catarrh of the stomach and intestines; congestion of the liver, rendering it torpid; the kidney disturbances generally appear in the form of a sediment in the urine The heart is often affected in the form of palpitations and shortness of breath. The nervous system also shows evidences of a general upset. Sometimes the limbs become very trembly. . . she may become delirious, or even go insane.

LIBRARY OF HEALTH, *supra* note 50, at 680.

five. Even today, some doctors, therapists, and healthcare givers are woefully uninformed about menopause and are neither interested in nor motivated in researching this area. “‘You’re just in the menopause’ is often the answer given to a patient who comes to a doctor reporting depression, anxiety, headaches, loss of libido, etc.”⁵²

In the Sixteenth Century, the ending of the menstrual cycle was viewed as a negative process whereby evil humors remained present in the body, capable of adding to that complex of female wickedness that could turn aging women into witches. According to one French physician: “‘When seed and menstrual blood are retained in women besides [beyond] the intent of nature, they putrefie and are corrupted, and attain a malignant and venomous quality.’”⁵³

In a treatise on witchcraft, Reginald Scot traced witchery’s origin among women to the operation of melancholy in the blood. “He reasoned that the end of women’s monthly bleeding, which had regularly relieved them of this malevolent bodily humor, made it almost impossible for aging women not to be susceptible to witchcraft.”⁵⁴

As sexualized beings, aging women were malevolent creatures, the devil’s “go-betweens” to the human world. So an old German proverb expressed it: “Where the Devil cannot go, he sends an old woman.” These women themselves were supposedly engaged in a vast conspiracy of secret prostitution, as they controlled those young female devils (the succubi) and the young male devils (the incubi) whom they sent to seduce others and to enlist them in their satanic worship.⁵⁵

These remarkably negative attributes ascribed to women are perhaps a result of the confusion presented by women’s monthly cycles. Men’s bodies do not have obvious cycles; and because early commentators such as Scot used male physiology as a reference point, women were considered “different.” Women’s physiological difference was confusing to men and led to the fear and misapprehension evident in so many early sources that speak of women as impure or defective.⁵⁶ Indeed, the connection between menstrual discharge,

52. JUDITH GOLDEN, A FEMINIST DICTIONARY 267 (Cheris Kramarae & Paula A. Treichler eds., 1991).

53. LOIS W. BANNER, IN FULL FLOWER: AGING WOMEN, POWER, AND SEXUALITY 192 (1992) (quoting REGINALD SCOT, THE DISCOVERIE OF WITCHCRAFT (1972)) (alteration in original).

54. *Id.*

55. *Id.* at 193. See also SCOT, *supra* note 53, at 42-43 (Scot further contended that “old witches are shown to procure as many virgins for Incubus as they can, whereby in time they grow to be excellent bawds”).

56. Apart from the physical and mental changes that have always attended what we perceive as the normal aging process, puberty is the only change or cycle that is recognized in men. However, outside the medical mainstream questions have arisen about the possibility of a male menopause, and if it in fact exists, how and whether this cycle should be treated. See, e.g., Tom Hodgkinson & Anna Selby, *Health: And When He Suffers From the Menopause*, DAILY TELEGRAPH, Aug. 10, 1993, at 13; Gail Vines, *Science: Mixing a Mean Testosterone*, INDEP., Sept.

uncleanliness, impurity and death is demonstrated and reinforced as far back as the Old Testament, which states the Jewish law that a woman must be avoided by her husband during her bleeding and for seven days after her bleeding stops.⁵⁷ The Romans and even Aristotle considered female infants as suffering "from some sort of birth defect."⁵⁸ Men bleed only if they are cut, or if a serious disease is about to take their life. A woman bleeds, unless pregnant, every month for thirty-five to forty years, if she lives that long.⁵⁹ Therefore, it seemed

26, 1993, at 68. *But see*, John B. McKinley et al., *The Questionable Physiologic and Epidemiologic Basis for a Male Climacteric Syndrome: Preliminary Results from the Massachusetts Male Aging Study*, MATURITAS, June 11, 1989, at 103 (reporting preliminary findings by John B. McKinley, Director of the New England Research Institute, examining physiological and epidemiologic evidence of "male menopause").

57.

When a woman has a discharge, her discharge being blood from her body, she shall remain in her impurity seven days; whoever touches her shall be unclean until evening. Anything that she lies on during her impurity shall be unclean; and anything she sits on shall be unclean And if a man lies with her, her impurity is communicated to him; he shall be unclean seven days, and any bedding on which he lies shall become unclean.

When a woman has had a discharge of blood for many days, not at the time of her impurity, or when she has a discharge beyond her period of impurity, she shall be unclean, as though at the time of her impurity, as long as her discharge lasts. . . .

When she becomes clean of her discharge, she shall count off seven days, and after that she shall be clean. On the eighth day she shall take two turtledoves or two pigeons, and bring them to the priest at the entrance of the Tent of Meeting. The priest shall offer one as a sin offering and the other as a burnt offering; and the priest shall make expiation on her behalf, for her unclean discharge, before the LORD.

You shall put the Israelites on guard against their uncleanness, lest they die through their uncleanness by defiling My Tabernacle which is among them.

Leviticus 15:19-31, reprinted in TANAKH, A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT (1985)).

58. THOMAS HARDY LEAHEY, *A HISTORY OF PSYCHOLOGY: MAIN CURRENTS IN PSYCHOLOGICAL THOUGHT* 6, 214 (2d ed. 1987).

St. Thomas Aquinas codified in *Summa Teologica* the concept of women as defective when he wrote:

Reply Obj. 1. As regards the individual nature, woman is defective and misbegotten, for the active force in the male seed tends to the production of a perfect likeness in the masculine sex; while the production of woman comes from a defect in the active force or from some material indisposition, or even from some external influence; such as that of the south wind, which is moist, as the Philosopher observes (*De Gener Animal.* iv 2). One the other hand, as regards human nature in general, woman is not misbegotten, is but included in nature's intention as directed to the work of generation.

ST. THOMAS AQUINAS, *SUMMA TEOLOGICA*, Part I, ques. 92, art. 1, 466 (Fathers of the English Dominican Province trans., First Am. ed. 1947).

59. "Before the [Twentieth C]entury, shorter life spans meant that menopause was usually followed in fairly short order by death." Jean Seligmann et al., *Not Past Their Prime*, NEWSWEEK,

apparent to men that women were either injured, very ill, or for those women who exhibited no other signs of disease, that they suffered from some dire defect that only afflicted females.⁶⁰

Further, because of their bleeding illness, it followed that women must need care and protection to live with their defect.⁶¹ Under this theory, women are not able to fully participate in public life and make rational decisions.⁶² Taking the syllogism to its logical conclusion, however, observers should have concluded that: If a woman who bleeds is ill, one who permanently stops bleeding is well, and thus able to achieve greater or at least equal status to men. That was not the case. In fact, as these early writings demonstrate, women were captive to their physiology. This presented a dual problem: Women had a bleeding defect when fertile, and a fertility defect when they stopped bleeding. Or from another perspective: "Women before menopause are scary because of the magic of fertility; women after menopause are scary because they are exempt from sexual taboos."⁶³

Aug. 6, 1990, at 66.

[As late as] the turn of the [Twentieth C]entury many women never reached menopause. Their average life expectancy was 48 years. The ones still alive probably had children at home during menopause because they gave birth to more children and at a later age than today's women. . . .

* * *

Human females are the only mammals who continue to live long after their ovaries cease to function. Some medical scientists have raised the question of whether it's some kind of a mistake that women now live so many years without estrogen.

SALLY CONWAY, *MENOPAUSE: HELP AND HOPE FOR THIS PASSAGE* 46-48 (1990).

60. Ancient Greek physicians attributed disease for which they could find no physiological basis to a diseased uterus. From this usage arose the condition known as hysteria. Even up to the time of Freud, hysteria was still widely considered to be the most widespread psychological disorder and it was, of course, believed to be a disease exclusive to woman. See LEAHEY, *supra* note 58, at 214-15.

61. Care and protection for the "weaker sex" was a view espoused well into the Twentieth Century and enforced in law. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding an Illinois statute prohibiting a woman from becoming a lawyer); *Nephew v. Liquor Control Comm'n*, 57 N.W.2d 466, 468 (Mich. 1953) (upholding a statute prohibiting a woman from working as a bartender).

62. See *Bradwell*, 83 U.S. at 130; *Nephew*, 57 N.W.2d at 466. Freud couched the concept differently as revealed in a letter written by him to his fiancée:

It seems a completely unrealistic notion to send women into the struggle for existence in the same way as men. Am I to think of my delicate, sweet girl as a competitor? . . . Women's delicate natures . . . are so much in need of protection. [Emancipation would take away] the most lovely thing the world has to offer us: our ideal of womanhood . . . the position of woman cannot be other than what it is: to be an adored sweetheart in youth and a beloved wife in maturity.

LEAHEY, *supra* note 58, at 213 (alteration in original).

63. Elizabeth Kincaid-Ehlers, *Bad Maps for an Unknown Region: Menopause from a*

Until the early 1900s, a woman's ability to serve her primary function of childbearing and her life span were about equal.⁶⁴ Because so few women reached the age of menopause, and even fewer lived beyond these years, there is little historical reference to the menopausal woman. Extrapolating from the limited references available, we reasonably can conclude that the older woman was not greatly esteemed by a western society that valued women primarily for their childbearing ability.⁶⁵ As St. Thomas Aquinas said:

It was necessary for woman to be made, as the Scripture says, as a helper to man; not, indeed, as a helpmate in other works, as some say, since man can be more efficiently helped by another man in other works; but as a helper in the work of generation.⁶⁶

This utilitarian view of woman solely as procreator, however, is not universal. In some non-western cultures the difference is quite stark. Older women are revered and their status actually improves with age. For example, Indian women's status improves at menopause⁶⁷ and in "some southern African cultures, women at menopause are relieved of household chores and invited to sit with the men on tribal councils."⁶⁸

Mischaracterization of menopause may result not only from fear and misunderstanding of menstruation, but also from lack of information and positive role models. The scarcity of literary representations of menopause or the process of female aging, for example, also contributes to the misapprehension.⁶⁹ One probably could count on one's fingers the number of positive representations of older women.⁷⁰ One literature critic writes that "women of the ages from forty-five to sixty are literary missing persons."⁷¹ Even modern literature does not offer a model for an easy understanding of this part of women's lives, and does

Literary Perspective, in CHANGING PERSPECTIVES ON MENOPAUSE, *supra* note 40, at 24, 28 (pointing out many double binds in which women are caught, with menopause as the classic one).

64. See J.A. Harper, Letter, *HRT is a Valid Response to Hormone Failure*, INDEP., Oct. 27, 1991, at 23 ("In the animal kingdom it is usual for the female of the species to die off after the fertile period has passed. It is only comparatively recently that mankind has lived beyond this point.").

65. Plato, for example, considered the prime of a woman's life to be a period of only 20 years, but a man's was 30. PLATO, THE REPUBLIC, PART IV, 242.

66. ST. THOMAS AQUINAS, *supra* note 58, at 466.

67. See Ann Lloyd, *Health: Dismantling the Myth of the Menopause*, INDEP., Oct. 15, 1991, at 17.

68. Michele Ingrassia, *The Last Taboo*, NEWSDAY (Nassau Edition), May 11, 1992, at 44.

69. See, e.g., Kincaid-Ehlers, *supra* note 63, at 24-38.

70. See, e.g., JUNE ARNOLD, *SISTER GIN* (1975) (a guerilla band of older women use menopause as a weapon in their mission to avenge wrongs done to women); RITA MAE BROWN, *SIX OF ONE* (1978) (covering three generations of women, their love and sexuality); DORIS LESSING, *THE SUMMER BEFORE THE DARK* (1973) (a 45-year-old woman no longer needed as wife and mother confronts her life, old age and death).

71. Kincaid-Ehlers, *supra* note 63, at 27.

little to debunk menopause myths.

B. Nineteenth and Twentieth Century Mystery and Misinformation

1. *The Denormalization of Menopause.*—As the life span of women and their economic value began to increase and more women lived into and beyond menopause, western society grappled with the physical and cognitive abilities of post-menstrual women. Before long, a host of disease pathologies, both mental and physical, that perpetuate the myth of the incapacity of women were attributed to menopause. Western society and western medicine adopted and expanded upon the ancient concept of *hysteria*, a disorder of women that Greeks ascribed to a nonfunctional or diseased uterus.⁷² Health problems such as irritability, blurred vision, weight changes, emotional and psychiatric disorders all were blamed on menopause.⁷³ These views were reinforced by an authoritative medical community that, with little or no research, developed a well received and widely accepted theory that menopause was the cause of a behavioral syndrome they labeled “involutional melancholia.”⁷⁴

72. Hysteria is from the Greek word for uterus, *hysteria*. It was “used to refer to . . . a disease of females characterized by multiple somatic complaints that do not appear to result from physical illness and by a chronic fluctuating course . . . which once was considered a physical disorder (it was attributed by the ancient Greeks to displacement of the uterus . . .).” DORLAND’S DICTIONARY, *supra* note 8, at 811. See also *supra* note 60.

73. See Jean Latz Griffin, *Time For A Change: An Enlightened Generation Buries the Myth of Menopause*, CHI. TRIB., Oct. 8, 1989, at 61; see also *Armour v. Tomlin*, 42 S.W.2d 634, 636 (Tex. App. 1931) (testifying expert stated that the “change of life affects the nervous system and produces organic disturbances; that such a nervous condition sometimes creates vomiting and a lack of appetite, or on the other hand, an abnormal appetite; that fluctuations in temperature and loss of weight under such conditions are not infrequent”).

74. Sandy Rovner, *Menopause and Mysterious Moods*, WASH. POST, Feb. 14, 1989, at Z20. 296.0 Involutional melancholia[:]

This is a disorder occurring during the involutional period and characterized by worry, anxiety, agitation, and severe insomnia. Feelings of guilt and somatic preoccupations are frequently present and may be of delusional proportions. This disorder is distinguishable from Manic-depressive illness (q.v.) by the absence of previous episodes; it is distinguished from Schizophrenia (q.v.) in that impaired reality testing is due to a disorder of mood; and it is distinguished from Psychotic depressive reaction (q.v.) in that depression is not due to some life experience. Opinion is divided as to whether this psychosis can be distinguished from the other affective disorders. It is, therefore recommended that involutional patients not be given this diagnosis unless all other affective disorders have been ruled out. (In DSM-I this disorder was considered one of two subtypes of “Involutional Psychotic Reaction.”[D])

AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 36 (2d ed. 1968).

“Involutional melancholia [was] a term formerly used to describe an agitated depression in a person of climacteric age. Currently, such persons are not distinguished from depressed patients

2. *The Medical "Menopause as Disease" Model.*—With influence from the medical community, society clung to a pervasive attitude that a menopausal woman was a fragile creature given to raging emotional peaks and valleys and better kept at home where she could do the least damage.⁷⁵ In 1899, author Charlotte Perkins Gilman observed the travails of women's domestic subordination when she wrote about her own personal despair with the so-called rest cure in *The Yellow Wallpaper*,⁷⁶ a slim volume that has become a classic. While she, in fact, was going mad from domestic boredom, her husband and brother—physicians both—were quite sure of the wisdom of their treatment for her hysteria or female melancholia.

John laughs at me, of course, but one expects that.

John is practical in the extreme. He has no patience with faith, an intense horror of superstition, and he scoffs openly at any talk of things not to be felt and seen and put down in figures.

John is a physician and *perhaps*—(I would not say it to a living soul, of course, but this is dead paper and a great relief to my mind)—*perhaps* that is one reason I do not get well faster.

You see he does not believe I am sick!

And what can one do?

If a physician of high standing, and one's own husband, assures friends and relatives that there is really nothing the matter with one but temporary nervous depression—a slight hysterical tendency—what is one to do?

My brother is also a physician, and also of high standing, and he says the same thing.

So I take phosphates or phosphites—whichever it is—and tonics,

of other age groups." THE AMERICAN PSYCHIATRIC ASSOCIATION'S PSYCHIATRIC GLOSSARY 54 (1984). Another term commonly used was the "climacteric [m]enopausal period in women. Sometimes used to refer to the corresponding age period in men." *Id.* at 19. Involutional melancholia was described in 1896 in the fifth edition of *PSYCHIATRIE* by Kraepelin:

Melancholia . . . sets in principally, or perhaps exclusively . . . in women from the period of the menopause onwards About a third of the patients make a complete recovery. In severe and protracted cases, emotional dullness may remain, with faint traces of the apprehensive tendency. Judgement and memory may also undergo considerable deterioration. The course of the disease is always tedious, and usually continues, with many fluctuations, for from one to two years or even longer, according to the severity of the case.

EMIL KRAEPELIN, *PSYCHIATRIE: EIN LEHRBUCH FÜR STUDIERENDE UND AERTZE* (5th ed. 1896).

75. See, e.g., CONEY, *supra* note 39, at 67; MARY CRAWFORD & RHODA UNGER, *WOMEN AND GENDER: A FEMINIST PSYCHOLOGY* 487 (1992).

76. CHARLOTTE PERKINS GILMAN, *THE YELLOW WALLPAPER AND OTHER FICTION* (1973). This chilling story about a woman's mental breakdown as a result of the isolation imposed upon her by her physician husband, enlightens and reflects a woman's views of the medical profession in the late 1800s.

and air, and exercise, and journeys and am absolutely forbidden to "work" until I am well again.

Personally I disagree with their ideas.⁷⁷

Involitional melancholia, a syndrome with such an impressive name, required equally impressive therapy. For the treatment of any woman so labeled, it was considered proper to rely upon powerful sedatives⁷⁸ and massive doses of hormones.⁷⁹ These were administered, in some cases, over a period of many years. A woman also might be treated with harsher means, such as shock therapy, in an effort to "cure" this disease.⁸⁰ In more extreme cases women were confined to mental institutions⁸¹ for long periods, even years. If a woman who was emotionally stable sought care for any of the symptoms of menopause from the medical community, there was always a chance that the treatment itself would lead to permanent incapacity.⁸²

Medical professionals developed careers around the physical and emotional disorders of menopause.⁸³ When called to the courtroom, their testimony was

77. *Id.* at 3-4.

78. Kraepelin described the pharmacotherapy employed in the treatment of menopause around the turn of this century: "Paraldehyde is generally to be recommended, or, under some circumstances, alcohol, or occasional doses of trional. Opium is employed to combat the apprehension, in gradually increasing doses." EMIL KRAEPELIN, LECTURES ON CLINICAL PSYCHIATRY 9-10 (1904) [hereinafter LECTURES ON CLINICAL PSYCHIATRY].

79. See GREER, *supra* note 40, at 13-16.

80. The following quote of medical expert testimony from a 1966 case provides insight into what was at that time considered appropriate medical treatment for menopause. "[S]he had received shock therapy during the period of her hospitalization as part of the treatment for involitional melancholia which he defined as mental depression, occurring with the menopause and that in February 1961 she had undergone a hysterectomy." *In re St. John*, 272 N.Y.S.2d 817, 823 (N.Y. Fam. Ct.) (emphasis added), *rev'd*, 274 N.Y.S. 2d 798 (1966).

81. Kraepelin recommended institutionalization of women as a superior form of treatment for this malady: "The treatment of the malady cannot, as a rule, be carried out, except in an asylum, as thoughts of suicide are almost always present. Patients who show such tendencies require the closest watching day and night." LECTURES ON CLINICAL PSYCHIATRY, *supra* note 78, at 9.

Anecdotal evidence from cases in the early 1920s reveals that institutionalization was, in fact, a treatment option. See, e.g., *Lunt v. Lunt*, 121 S.W.2d 445 (Tex. App. 1938). "[I]n 1928 appellant was undergoing her menopause, and during a 'severe paroxysm of her ailment' appellee filed lunacy charges against her. . . . Appellant was returned home within about six weeks. She was still suffering from her menopause, however, and was returned to the asylum, where she was desperately ill." *Id.* at 446.

82. Incapacity might be physical, mental or legal, or all three combined.

83. Medical professionals served as expert witnesses, and operated public and private institutions for the treatment of the mental disorders they believed to be caused by menopause. Surgery was regularly performed to cure the mental and physical symptoms of the disease. See Mary Lou Logothetis, *Our Legacy: Medical Views of the Menopausal Woman*, in WOMAN OF THE 14TH MOON: WRITINGS ON MENOPAUSE 40-46 (Dena Taylor & Amber Coverdale Sumrall eds.

replete with scientific sounding jargon that the court frequently asked them to translate into lay terms.⁸⁴ When this was done, the records reveal that their testimony amounted to little more than stereotyped, folkloric conclusions.⁸⁵

Medical opinions and expert testimony also included condescending language of misplaced compassion and understanding for women they held to be disabled by the unavoidable condition of menopause. One physician testifying about injuries sustained by a woman who was run over by a taxi stated: "[T]here is no question in my mind but that probably she was suffering at the time she came to me. The question in my mind is the cause of the suffering."⁸⁶ Saying further that in his opinion the symptoms she told him of were "due entirely to the menopause, the change of life in this case."⁸⁷ Another physician testifying about the debilitating "stated effects" of menopause even went so far as to suggest that testimony of a woman was not truthful due to menopause. In his words: "[T]he woman was suffering from hysteria and . . . in her physical and mental state *due to having recently passed through the menopause her testimony was not to be believed.*"⁸⁸ Concurrently, courts developed a pattern of paternalistically patting women on the head while reducing or limiting damage awards.⁸⁹

Thus, like mirrors, many courts reflected the prevailing medico/social view that women at or about the age of menopause were subject to various physical, emotional and mental maladies. Supported by seemingly reasonable and rarely contested medical testimony, courts would: 1) allow juries to consider effects of menopause;⁹⁰ 2) allow themselves to consider the effects, even when not raised

1991).

In 1967, Wolf H. Utian, M.D., set up the first menopause clinic in Groote Schurr, South Africa and worked closely with the pharmaceutical industry on studies and trials of hormone replacement drugs. See GREER, *supra* note 40, at 13-14.

84. See *infra* notes 86-88 and accompanying text.

85. Stephanie Dallam, author of *Men and Menopause: A Survey of Knowledge and Attitudes*, stated that "most of what health professionals were taught about menopause arose out of our belief system, which views events connected with women and ageing as negative, but was not based on any research." *Men's Knowledge of Menopause Examined*, available in LEXIS, NEXIS Library, UPI File.

86. *Oliver v. Detroit Taxicab Co.*, 177 N.W. 235, 237 (Mich. 1920).

87. *Id.*

88. *Mayor of Beverly v. First Dist. Court of Essex*, 97 N.E.2d 181 (Mass. 1951) (emphasis added).

89. See, e.g., *Tate v. Western Union Tel. Co.*, 96 S.W.2d 364 (Mo. 1936) (reducing jury award by \$5000).

90. See *Oliver*, 177 N.W. at 235 (stating that lower court properly allowed jury to weigh testimony of doctor who stated that plaintiff's condition was due to menopause); *City of Beaumont v. Wiggins*, 136 S.W. 260 (Tex. App. 1940) (finding that lower court erred in not instructing jury of plaintiff's prior disability of menopause for purposes of damage award); but see *Hirsh v. Manley*, 300 P.2d 588 (Ariz. 1956) (upholding the lower court, the Supreme Court of Arizona rejected defendant's instruction that would have advised the jury that it could not award any damages for plaintiff's preexisting condition of menopause).

in the trial court; and 3) allow reduced awards to women because menopause was partly responsible for their complaints and therefore not compensable by the tortfeasor.⁹¹

Moreover, while the success of this defense was heavily dependent upon medical opinion evidence, the recorded opinions we found are remarkably silent with respect to the admissibility of such expert testimony. In 1923, in *Frye v. United States*⁹² the defense wished to present expert testimony that deception could cause a rise in systolic blood pressure. The court prohibited this evidence because it found the deduction of truthfulness with respect to blood pressure was not "sufficiently established to have gained general acceptance" in its field.⁹³ Thus, the "general acceptance in the medical or scientific community" standard was born, and soon became the test of admissibility in almost all jurisdictions. A few menopause defense cases pre-date the general acceptance standard, yet, even after the *Frye* test gained in national recognition, the admissibility of expert testimony on menopause seemed to go unchallenged. With all the documented ailments of the menopausal woman and a host of medical experts able and willing to testify to her ills, it is perhaps not unusual that creative members of the legal community seized upon this condition. Thus, we can see the menopause defense as a metaphor of societal perceptions of middle-aged women and a manifestation of how cultural assumptions become accepted and embedded in the legal and the medical communities.

II. TALES FROM THE COURTROOM—MENOPAUSE AS A LEGAL DEFENSE

Menopause as a legal defense has a checkered past. From 1900, when the defense made its first appearance through its last usage in 1985, it was invoked in over fifty reported appellate decisions.⁹⁴ Because most trial court opinions are unreported and, for the most part inaccessible, the actual usage of the defense is unknown. From the 1900s to the late 1920s we found six decisions. The pace picked up in the 1930s with eight cases, doubled to sixteen in the 1940s, and then dropped back to eight, eight, and six in each of the next three decades that preceded its demise.⁹⁵ It is telling that the menopause defense experienced its greatest usage during the World War II years, concurrently with the era that women encountered their first enfranchisement as full-fledged members of the American work force.⁹⁶

The three general categories of cases where the defense appeared were:

91. See, e.g., *Lee v. Lincoln Cleaning & Dye Works*, 15 N.W.2d 330 (Neb. 1944) (reducing worker's compensation award because of conflicting medical testimony on the impact of menopause on plaintiff's injury).

92. 293 F. 1013 (D.C. Cir. 1923).

93. *Id.* at 1014.

94. In our research we were unable to access trial records in cases that never went to appeal. Thus, the actual number of times the defense was asserted is likely much greater.

95. See Appendix.

96. See *infra* notes 134-39 and accompanying text (discussing *Rosie the Riveter*).

negligence/personal injury matters; divorce; and worker's compensation cases. Additionally, we found three remarkable product liability decisions involving foreign substances in beverage bottles.⁹⁷ After the 1960s, all cases were accident matters. By the 1980s, the use of menopause as an affirmative defense slowed to a trickle.

After *Laskowski*, if a female plaintiff was over age thirty-five, some defendants had no qualms about raising her "menopausal or pre-menopausal condition" as a defense to a host of claims.⁹⁸ Defendants would allege that the ailments or afflictions of the plaintiff were related to menopause rather than the negligence of the defendant,⁹⁹ or that menopause somehow exaggerated or extended an injury.¹⁰⁰ In divorce actions, menopause sufficed for cause

97. *Day v. Rains*, 220 S.W.2d 575 (Ky. 1949) (allowing defendant's claim that plaintiff's digestive problems and vomiting were due to her menopause rather than to the rusty, used razor blade that was in the Pepsi-Cola she ingested); *Hollis v. Ouachita Coca-Cola Bottling Co.*, 196 So. 376, 378 (La. Ct. App. 1940) (allowing doctor's statement that the woman who swallowed pieces and poison of a Black Widow spider found in bottle of Coca-Cola had symptoms due to menopause, and that "a normal individual should be over the effects in a week"); *Laurel Coca Cola Bottling Co. v. Hankins*, 75 So. 2d 731 (Miss. 1954) (allowing defendant's argument that plaintiff's menopause was responsible for exaggerating her injury caused by foreign substance known as "Acid Iron Earth Water" in her Coca-Cola).

98. *See, e.g., Cimijotti v. Cimijotti*, 121 N.W.2d 537 (Iowa 1937) (defending a divorce action); *Maroun v. New Orleans Public Serv. Inc.*, 83 So. 2d 397 (La. Ct. App. 1955) (defending a negligence action involving an automobile accident); *Laurel Coca Cola Bottling*, 75 So. 2d at 731 (defending a products liability case).

99. *See Montgomery v. Manos*, 440 P.2d 629 (Kan. 1968) (introducing defendant's expert testimony of plaintiff's history of menopausal complaints to defeat her claim in an automobile related negligence action); *Oliver v. Detroit Taxicab Co.*, 177 N.W. 235 (Mich. 1920) (arguing defendant's attribution of all plaintiff's symptoms to her menopause rather than to her having been hit by the defendant's taxi cab); *Johnson v. Gulfport Laundry & Cleaning Co.*, 162 So. 2d 859 (Miss. 1964) (holding involuntional psychotic reaction without psychosis as a result of menopause caused the plaintiff's illness); *Brown v. Payne*, 264 S.W.2d 341 (Miss. 1954) (showing a drunk driver defendant's attempt to prove that plaintiff's complaints were related to her menopause); *Airline Motor Coaches v. Green*, 217 S.W.2d 70 (Tex. App. 1949) (involving a doctor's opinion that plaintiff's condition was a result of menopause rather than a brain injury resulting from a bus accident).

100. *See, e.g., Four Branches, Inc. v. Oechesner*, 73 So. 2d 222 (Fla. 1954) (agreeing that the claimant was in the "throes" of menopause); *Merritt v. Hemstead*, 206 So. 2d 718 (La. Ct. App. 1968) (ascribing defendant's argument concerning plaintiff's symptoms to delayed menopause, even though plaintiff testified that she passed through menopause several years prior to the accident); *Maroun*, 83 So. 2d at 397 (finding that the plaintiff's pain and personality change were related to her menopause and not a result of being thrown to the floor of a suddenly stopped bus); *Richey v. Service Dry Cleaners*, 28 So. 2d 284 (La. Ct. App. 1946) (asserting the claim that treatment required by the plaintiff was a result of a nervous condition related to menopause); *Laurel Coca Cola Bottling*, 75 So. 2d at 731 (Miss. 1954) (maintaining defense's argument that plaintiff's menopause was responsible for exaggerating her injury); *Vogrin v. Forum Cafeterias of Am., Inc.*,

necessary for divorce. It conveniently was introduced to support everything from a wife's insanity, to frigidity, to infidelity.¹⁰¹ Menopausal syndrome was used by both men and women as a defense to almost any ground for divorce from adultery to desertion.¹⁰² While the menopause defense found its most prolific usage in negligence and divorce actions, employers on several occasions used the plaintiff's menopause to limit or deny recovery in workman's compensation cases.¹⁰³ As long as a woman was thirty-five or over, efforts were made to blame

308 S.W.2d 617 (Mo. 1957) (stating menopausal condition of plaintiff prolonged her complaints related to her injury); *Croll v. Miller* 2 A.2d 527 (Pa. Super. 1938) (reducing workman's compensation awarded for loss of use of an arm because court found that her disability was contributed to by the fact that she had recently gone through menopause); *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955) (describing defendant's assertion that plaintiff's "female troubles" should reduce the amount of award for her injury); *City of Beaumont v. Wiggins*, 136 S.W.2d 260 (Tex. App. 1940) (alleging that plaintiff failed to properly recover due to menopause or other conditions).

101. See, e.g., *Sisson v. Sisson*, 36 Haw. 606 (1944) (arguing that the wife was undergoing menopause at time of marital discord); *English v. English*, 12 N.J. Misc. 239 (1934) (offering menopause as an excuse for wife's behavior that was found to be extreme cruelty); *Pearson v. Pearson*, 41 N.E.2d 725 (Ohio Ct. App. 1941) (asserting that wife's conduct may have been explained by menopause, but still supported divorce by husband on grounds of extreme cruelty); *Wiley v. Wiley*, 190 A. 363 (Pa. 1937) (using menopause to explain irritable and argumentative behavior during marriage in a divorce action); *Glass v. Glass*, 63 A.2d 696 (Pa. Super. Ct. 1949) (allowing expert testimony that when dealing with women, menopause must be considered).

102. The menopause defense was also used to explain the circumstances that caused a spouse to commit adultery, or otherwise act cruelly. See, e.g., *Danner v. Danner*, 206 So. 2d 650 (Fla. Ct. App. 1968) (asserting that wife's grievances were related to her menopause rather than to husband's maltreatment); *Cimijotti*, 121 N.W.2d at 537 (attributing plaintiff's condition to her menopause rather than to her husband's abuse throughout the course of their marriage); *King v. King*, 152 So. 2d 889 (Miss. 1963) (relating menopause to poor health); *Whinney v. Whinney*, 58 A.2d 183 (Pa. Super. Ct. 1948) (asserting that nervous ailment was produced by menopause); *Urffer v. Urffer*, 58 A.2d 580 (Pa. Super. Ct. 1944) (offering menopausal disturbance as an excuse for conduct); *Worthen v. Worthen*, 374 S.W.2d 935 (Tex. App. 1964) (discussing defendant's assertion that plaintiff's menopause caused her conduct to be erratic and withdrawn); *Gray v. Gray*, 24 S.E.2d 444 (Va. 1943) (alleging that menopause made defendant too sick to commit adultery). For further discussion, see *infra* Part II.D.

103. See, e.g., *Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259 (Ill. 1946) (describing defendant employer's assertion that claimant's pain in her right breast was related to her menopause rather than to the injury she sustained when a machine guard weighing 75 pounds fell on her chest during the course of her employment); *Johnson*, 162 So. 2d at 859 (asserting that woman's involuntal psychotic reaction was not work related but rather was a result of menopause); *Lee v. Lincoln Cleaning & Dye Works*, 15 N.W.2d 330 (Neb. 1944) (rejecting defendant's argument that plaintiff's condition was due to menopause); *Maryland Cas. Co. v. Davis*, 464 S.W.2d 433 (Tex. App. 1971) (limiting damages in a workman's compensation action); *American Employees' Ins. Co. v. Kellum*, 185 S.W.2d 113 (Tex. App. 1945) (remanding case for new trial because lower court erred in not allowing medical testimony as to plaintiff's menopause as a factor in her injury).

whatever complaint she had on menopause.

A. The Early Years

The first documented reference to menopause in a reported legal decision is found at the turn of the century, in a Texas case where the San Antonio Gas Company (the "Gas Company") unsuccessfully alleged that injuries sustained by a woman who fell into an uncovered trench were due to her menstrual difficulties, not her physical injuries.¹⁰⁴ On appeal, the Gas Company's claims of unfairness because the trial court refused to consider evidence of the plaintiff's age or her menstrual condition, were flatly denied.¹⁰⁵ A brief hiatus in assertion of this defense followed, and the next documented appearance occurs eleven years later in a New Jersey case quaintly titled *The Little Silver*.¹⁰⁶ This case involved a forty-four-year-old woman passenger on a boat (The Little Silver) traveling from New York to Long Branch, New Jersey.¹⁰⁷ The plaintiff, Borrea Johnson, was injured when The Little Silver ran into the starboard side of another boat.¹⁰⁸ When Ms. Johnson sued for negligence seeking damages, the defendants introduced a dramatic case about Ms. Johnson's reproductive condition—her "transition state from a woman's normal (reproductive) functions to the cessation of the same."¹⁰⁹ One physician, testifying for the insurance company, stated in response to a question about what symptoms are found during menopause:

You find all sorts of symptoms, particularly you are apt to find nervous symptoms, hallucinations, dizziness, pain, fear of impending death, fear of going insane; in fact, women at that period do go insane, sometimes temporary, and sometimes it is permanent.¹¹⁰

But, unswayed by opinions and comments of the insurance company physicians, the court discredited the defendants' attempts to devalue Ms. Johnson and concluded that:

A woman, passing through the physical transition peculiar to her sex, is entitled to as safe passage as any other person, and is not barred of a full recovery for injuries sustained through another's negligence because that condition makes such injuries more painful, or renders her less capable

104. *San Antonio Gas Co. v. Singleton*, 59 S.W. 920 (Tex. Civ. App. 1900).

105. *Id.* at 921.

106. 189 F. 980 (D.N.J. 1911).

107. *Id.* at 981.

108. *See id.*

109. *Id.* at 985. The record is silent with respect to objections made to preclude such testimony and evidence, and the trial court seemed very willing to accept this evidence as true. On appeal, as well, there is no discussion of the admissibility of this evidence.

110. *Id.* This conclusion is consistent with the speculative and uninformed opinions of the medical profession at this time. See *supra* note 15 discussing that sex hormones were not discovered until the 1920s.

of a prompt recovery.¹¹¹

Just a few short years later, the judicial climate showed signs of change. And, the rise of the menopause defense truly began with Anna Laskowski's case in Michigan in 1916.

The use of the menopause defense in *Laskowski v. People's Ice Co.*,¹¹² is the third reported case that uses menopause to deflect blame and limit recovery in a negligence action.¹¹³ However, unlike the earlier decisions in Texas and New Jersey, the Michigan Supreme Court did not reject the defense outright as a legal matter. Rather, it based its ruling on a factual finding. While the court simply may have been attempting to finesse this uncharted issue, its deliberate statements that it found no factual basis in the record that the plaintiff was in menopause¹¹⁴ unambiguously signaled to others that had the defense proved Ms. Laskowski was "going through" menopause, the court would have considered and weighed that evidence. But, given no factual basis, it denied the appeal.¹¹⁵ This first implicit recognition of the validity of such a defense opened the door for other defendants to assert it.

The next use of the menopause defense in 1920 was no more successful than its previous assertions. In *Oliver v. Detroit Taxicab Co.*,¹¹⁶ the plaintiff, Ms. Oliver, sustained a brain concussion, a crushed right foot, and other injuries, when she was struck by a speeding taxicab that jumped the curb and hit her as she was standing on the sidewalk.¹¹⁷ The defendant, Detroit Taxicab, did not question its liability for the accident caused by the negligent operation of the taxicab by its employee; but, rather, the defendant sought to limit the recovery of damages by Ms. Oliver.¹¹⁸ Defense counsel presented expert medical witnesses who testified that the woman's physical complaints and mental symptoms were "*due entirely to the menopause, the change of life in this case.*"¹¹⁹ Ms. Oliver presented testimony by her own medical expert who labeled her condition to be "traumatic neurasthenia."¹²⁰ The jury found for Ms. Oliver and this judgment was affirmed by the Michigan Supreme Court.¹²¹

111. *Id.* at 986. Without actually saying so, this court seemingly applied the eggshell plaintiff doctrine—that a defendant takes a victim as he finds her. *See infra* notes 147-50 and accompanying text (discussing how the eggshell plaintiff doctrine was not applied with consistency in menopause cases).

112. 157 N.W. 6 (Mich. 1916).

113. *See supra* notes 1-6 and accompanying text.

114. *Laskowski*, 157 N.W. at 8.

115. *Id.*

116. 177 N.W. 235 (Mich. 1920).

117. *Id.* at 236.

118. *See id.*

119. *Id.* at 237 (emphasis added).

120. *Id.* This is the same condition that Ms. Laskowski suffered from. For a definition of traumatic neurasthenia, see *supra* note 8.

121. *Oliver*, 177 N.W. at 239.

Having met with no success on at least four prior occasions, it might be reasonable to expect the menopause defense was dead and gone forever. But, deeply ingrained in the collective mind of society was the idea that menopause was a physical and mental disability that could cause nervous conditions, and the challenge for acceptance of menopause as a defense was far from over. Rather, its cause was advanced in 1936 when the Missouri Supreme Court, of its own initiative, used menopause as an excuse to reduce an award to a female plaintiff.¹²² Interestingly, this first full endorsement of the menopause defense coincided with the medical community's increased attention to menopause as a disease.¹²³

In *Tate v. Western Union Telegraph Co.*,¹²⁴ Lena Tate was cleaning her kitchen linoleum with a wet mop when a Western Union message wire, designed to carry 110 volts of electricity, fell upon a 13,200 volt power line.¹²⁵ The fallen message line came in contact with a metal rail on Ms. Tate's porch, creating an explosion, and sending a flash of flame into Ms. Tate's kitchen.¹²⁶ She received a shock and fell to the floor. Medical experts testified that Ms. Tate suffered from multiple injuries including a partial left side anesthesia, nervousness, and a disabling, painful, and permanent arthritis of the spine, which limited her mobility.¹²⁷ A physician who examined Ms. Tate six years after the accident concluded that Ms. Tate's condition had improved, but found it unlikely that she would completely recover from her injuries.¹²⁸ Lena Tate sued Western Union. The jury found in her favor and returned a verdict of \$25,000, which was reduced by the trial judge upon forced remitter to \$17,500.¹²⁹ Contrary to the jury verdict, the Missouri Supreme Court concluded that Ms. Tate's injuries were not sufficiently disabling to warrant the verdict and further reduced her award to \$12,500, half of what the jury originally awarded.¹³⁰ The only apparent basis for this reduction is found in one paragraph near the end of the opinion, where the court wrote that the woman suffered no bone fractures, and "was at the age when the menopause condition sets in and nervousness accompanies that condition."¹³¹

In fact, Lena Tate was thirty-nine and in excellent health at the time of the accident. She was forty-five by the time the case went to trial.¹³² The trial record is devoid of any reference to menopause, and the Missouri Supreme Court had

122. See *Tate v. Western Union Tel. Co.*, 96 S.W.2d 364 (Mo. 1936).

123. See *supra* notes 75-93 and accompanying text.

124. 96 S.W.2d 364 (Mo. 1936).

125. See *id.* at 367.

126. See *id.* at 366-67.

127. See *id.* at 368.

128. See *id.*

129. See *id.* The judgment was further reduced by \$5000. See *id.*

130. *Id.* The court found that Ms. Tate's injuries were not as disabling as other cases where plaintiffs received awards of \$15,000 to \$18,000. It stated that the case would be reversed and remanded unless Ms. Tate accepted the lesser amount. *Id.* at 369.

131. *Id.* at 368.

132. See *id.* at 367.

no medical or other testimony to consider relating to Ms. Tate's estrogen levels and menstrual status.¹³³ Moreover, it was undisputed that Ms. Tate's injuries were the result of the defendant's negligence. Yet, the one senior and two middle-aged male judges (born in the late 1800s) concluded, on some apparent form of judicial notice, that because the plaintiff was in her mid-forties, her nervousness was caused by menopause.¹³⁴ And because she was so affected, her already reduced damage award was further cut by \$5000, representing the court's valuation of her injuries, and justifying this reduction by noting that a portion of her ailment was attributable to menopause.¹³⁵ *Tate* is one of the clearest examples of how misguided and misinformed lay attitudes and beliefs surrounding menopause in the 1930s yielded unfounded opinions and unfair legal results.

Not surprisingly, *Tate* was the harbinger of the golden age of the menopause defense. Litigants found just the encouragement they were looking for, and quickly pursued the path opened by this Missouri Supreme Court decision. The chauvinistic conclusion of the Missouri court was enough to give the menopause defense an aura of legitimacy, and for attorneys who used it, a hope of successful limitation of damages for their clients.

B. Pre and Post World War II—Women Enter the Workplace

The 1940s saw the emergence of the modern technological age in the United States. Communication was greatly improved. Most homes had telephones, and televisions began to appear, first in public places and then in private residences, across the country. As a result of the Second World War, the United States manufactured bigger, better, and faster airplanes. An atom bomb was used to dispatch its enemies and penicillin was used to fight infections. America also had the largest female industrial workforce in her history. As men left factory jobs to fight the war, women stepped into their place.¹³⁶

For the first time women were doing jobs that formerly only men were thought fit to perform.¹³⁷ They worked as welders, riveters, stevedores, and truck drivers, and helped transform America's peacetime industry to tool the war

133. *Id.*

134. *Id.* The members of the Missouri Supreme Court who decided *Tate* were Henry J. Westhues, age 48, born 1888; James A. Cooley, age 64, born 1872; and Walter H. Bohling, age 48, born 1888. The fact that each of them was older than Ms. Tate and perhaps beset with their own age related frailties seemed to escape their notice.

135. *Tate*, 96 S.W.2d at 368-69.

136. "Women comprised 37[%] of the workforce by war's end, compared with 27.6[%] before Pearl Harbor, and women in factory work increased 460[%] during the war." Deborah Zabarenko, *Rosie the Riveter Symbolized Wartime Changes for Women, Blacks*, REUTERS N. AM. WIRE, Dec. 1, 1991, available in LEXIS, News Library, Reuna File.

137. *Id.* See also Howard Hayghe, *Two-Income Families*, AM. DEMOGRAPHICS, Sept. 1981, at 35, 35 (stating that economic and technological factors increased the demand for women in the workforce).

effort.¹³⁸ For the first time many women experienced a sense of financial worth and social involvement, and found new and more rewarding places for themselves. Although African American women were assigned the harshest, most hazardous, and least desirable factory jobs, they too relished the opportunity to forego domestic labor for the chance to work in a factory.¹³⁹ Women managed and supported their households, and their children, while they simultaneously did a "man's" job in the workplace.¹⁴⁰

The foundation of the myth that women could only survive if they had the protection of a man was showing signs of instability. Even worse, most women liked their jobs and new public personas.¹⁴¹ When the soldiers returned from their posts, expecting to reclaim their jobs and their former dominant position, many women were reluctant to step aside and go back to the role of docile homemaker. Ironically, in this historical moment of women's strength and independence—the era of the mythological "Rosie the Riveter"—the menopause defense was asserted with its most significant frequency.

From 1941 through 1949, sixteen cases reviewed by various higher state courts involved the assertion of menopause as a defense.¹⁴² Of these cases, ten

138. See, e.g., DORIS KEARNS GOODWIN, NO ORDINARY TIME 364-65, 368-70, 373, 392, 393 (1994).

139. *Id.* at 369-70.

140. Nancy Nichols described "Rosie" for a generation of women who may not have been aware that she existed. Nancy A. Nichols, *Whatever Happened to Rosie the Riveter*, HARV. BUS. REV. July-Aug. 1993, at 54.

Rosie the Riveter is both a romantic and a heroic figure from the World War II era. A former housewife turned war hero, Rosie emerged from the kitchen and built the machinery necessary to fight and win World War II. Posters emblazoned with her picture became a symbol of wartime courage and patriotism. Her motto "We can do it!" stirred countless women.

And not only did Rosie do it, she did it better than anyone had ever done it before. Rosie was a key player in the retooling of U.S. industry from peacetime to wartime production. During the five years she was on the shop floor, from 1942 to 1947, productivity rose, product cycle time dropped, and quality improved.

Yet despite her success, Rosie was forced off the factory floor when the war ended, her achievements buried in books, all her accomplishments wiped out of our consciousness. She had proven her abilities, but she remained that cultural enigma: a woman in a man's job. Rosie's skills, which had helped win world War II, were deemed unnecessary in the fight for competitiveness that began about the time she left the factory. Rosie, it seemed, would have to spend the rest of her time baking cookies, not building machinery.

Id.

141. See GOODWIN, *supra* note 138, at 364-70.

142. See *Willbanks v. Laster*, 199 S.W.2d 602 (Ark. 1947); *Wuest v. Wuest*, 164 P.2d 32 (Cal. Dist. Ct. App. 1945); *Alderman v. Kelly*, 32 A.2d 66 (Conn. 1943); *Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259 (Ill. 1946); *Eils v. Works*, 55 N.E.2d 408 (Ill. App. Ct. 1944); *Day v. Rains*, 220 S.W.2d 575 (Ky. Ct. App. 1949); *Richey v. Service Dry Cleaners*, 28 So. 2d 284

were decided by appellate level courts, and six were reviewed by state supreme courts. Of the four automobile negligence cases reviewed during this period, the appellants claimed that verdicts were excessive because injuries should be attributed to menopause rather than negligence;¹⁴³ even low verdicts.¹⁴⁴ In one case the defendant prevailed, and a \$15,000 award was reduced to \$8500 because the court found that the plaintiff's nervous troubles were due to menopause.¹⁴⁵ In the other opinions, the respective courts often felt obliged to note that the defense failed for a factual reason, not for its illegitimacy.

Most remarkable, however, is the continued silence about and absence of any challenge to the introduction and use of expert testimony on menopause. After 1923, the need for expert testimony generally was evaluated by the factors enunciated in *Frye v. United States*.¹⁴⁶ These included whether: 1) there was a need for such testimony; 2) the observer was qualified to testify because of first hand knowledge of the situation at issue; 3) the expert opinion was admissible only if grounded in particular facts and; 4) whether the conclusions of the expert were grounded in scientific techniques recognized by the relevant scientific/medical community.¹⁴⁷ Testimony about menopausal syndrome seemed to come in unchallenged.

In almost all the cases medical opinion should have been disallowed for failure to meet one or more of the *Frye* factors. But, the challenges apparently were not raised, and courts were not forced to grapple with the admissibility of menopausal syndrome testimony. Either the lay assumptions and inherent stereotypes shared by all parties in the courtroom seemed to preclude any effective challenge; or, the cases were litigated by less than competent counsel. This failure to challenge the use of expert testimony with respect to the effects of menopause is particularly revealing when contrasted, for example, against the formidable opposition to expert testimony with respect to modern syndrome defenses, such as battered woman's syndrome, post traumatic stress disorders, and rape trauma syndrome.¹⁴⁸

(La. Ct. App. 1946); *Hanson v. City Light & Traction Co.*, 178 So. 2d 804 (Mo. Ct. App. 1944); *Lee v. Lincoln Cleaning & Dye Works*, 15 N.W.2d 330 (Neb. 1944); *Schwarz v. Loew's Theatre & Realty Corp.*, 273 A.D. 898 (N.Y. App. Div. 1948); *Pearson v. Pearson*, 41 N.E.2d 725 (Ohio Ct. App. 1941); *Glass v. Glass*, 63 A.2d 696 (Pa. Super. Ct. 1949); *Whinney v. Whinney*, 58 A.2d 183 (Pa. Super. Ct. 1948); *Urffer v. Urffer*, 35 A.2d 580 (Pa. Super. Ct. 1944); *Airline Motor Coaches v. Green*, 217 S.W.2d 70 (Tex. App. 1949); *Gray v. Gray*, 24 S.E.2d 444 (Va. 1943).

143. See *Alderman*, 32 A.2d at 67 (awarding approximately \$7700); *Richey*, 28 So. 2d at 287 (amending judgment for \$1500); *Schwarz*, 273 A.D. at 898 (reducing verdict by \$10,000 total); *Airline Motor Coaches*, 217 S.W.2d at 74 (finding that \$10,000 is not excessive).

144. See, e.g., *Richey*, 28 So. 2d at 287 (awarding only \$850 to plaintiff).

145. See *Schwarz*, 273 A.D. at 898-99.

146. 293 F. 1013 (D.C. Cir. 1923). See *supra* note 93 and accompanying text.

147. See *id.* at 1014.

148. See, e.g., *People v. Bledsoe*, 189 Cal. Rptr. 726, 729, 733 (Cal. Ct. App. 1983) (questioning the validity of "rape trauma syndrome" asserted by an appellant defendant convicted of forcible rape; in dissent, Judge Wiener stated that the trial court incorrectly assumed the validity

Another remarkable silence in the cases of the 1940s, as well as almost all other cases, is the continued absence of any application or even discussion of the "eggshell plaintiff doctrine." This doctrine articulates the basic rule of defendant liability for unforeseeable consequences—that a defendant takes a plaintiff as he finds her and is responsible for damages resulting from his negligent conduct regardless of any pre-existing condition.¹⁴⁹ A common refrain in the menopause defense cases is that the plaintiff was already damaged due to menopause, or she was not getting better because she was a malingerer as a result of her pre-existing or ongoing menopausal condition. If, however, a plaintiff had a pre-existing injury to his heart, arm, or head, that was exacerbated by defendant's negligence, that alone would not prevent recovery.¹⁵⁰ Yet, defendants in the menopause cases brazenly challenged liability by raising a female plaintiff's pre-existing emotional and medical state and shifted blame from the defendant's own negligent behavior to the plaintiff's physiological state. Rather than directly challenge the legality of invoking a pre-existing condition defense, some plaintiffs chose to attack the facts and attempt to disprove that they were in menopause.¹⁵¹ The lack of any mention of the eggshell plaintiff rule in the menopause defense cases suggests that either: 1) the eggshell plaintiff rule was not being uniformly applied; or 2) the courts were treating menopause primarily as an emotional or psychological illness and were unwilling to apply the eggshell plaintiff doctrine to emotional

of rape trauma syndrome and would have reversed the conviction); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (finding that the trial court erred in not allowing expert testimony on "battered women's syndrome" in a murder trial; the prosecution argued that the evidence of "battered women's syndrome" was not valid because the normal reaction for a woman in the defendant's position would be one of flight, not murder); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981) (overruling appeals court finding that expert testimony on "battered women's syndrome" was inadmissible).

149. See, e.g., *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 43, at 290 (5th ed. 1984). See also *Sumpter v. City of Moulton*, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994) (finding a tortfeasor liable for damages to eggshell plaintiff even though the plaintiff inevitably may suffer similar injuries from pre-existing condition); *Packard v. Whitten*, 274 A.2d 169, 177-78 (Me. 1971) (ruling that a defendant takes plaintiff as he finds her and is responsible for damages resulting from his negligent conduct even though injuries are more severe because of plaintiff's pre-existing condition).

150. See, e.g., *Finkelstein v. Michigan Ry.*, 163 N.W. 973 (Mich. 1917) (ruling that a plaintiff can recover for impaired vision even though his eye was impaired before the accident, so long as the additional injury is directly attributable to the accident); *Schwingschlegel v. City of Monroe*, 72 N.W. 7 (Mich. 1897) (ruling that a plaintiff suffering from a previously injured ankle and from tuberculosis is entitled to recover for increased pain, disability and expense). *Finkelstein* was decided one year after *Laskowski*, by the very same Michigan Supreme Court that stated that Anna Laskowski's pre-existing menopausal condition could limit her recovery.

151. See, e.g., *Merritt v. Hemstead*, 206 So. 2d 718 (La. Ct. App. 1968); *Hanson v. City Light & Traction Co.*, 178 S.W.2d 804 (Mo. Ct. App. 1944); *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955).

conditions.¹⁵²

For example, on a rainy night in Connecticut in 1941, James Kelly collided with a car driven by plaintiff's husband, Samuel Alderman.¹⁵³ As a result, Lillian Alderman spent thirty-one days in the hospital recovering from a brain concussion, headaches, dizziness, nausea, a severe contusion of her elbow, a fractured ulna, and contusions of her shoulder, hip, and hand.¹⁵⁴ She had surgery for her fractured bones, and a spinal tap revealed swelling of her brain.¹⁵⁵ The fact finder ruled and the intermediate appellate court affirmed that the defendant was negligent, and Mrs. Alderman was awarded \$6000 for pain and suffering, \$655.10 for domestic assistance and \$1114.35 for medical and hospital services.¹⁵⁶

The defendant, Kelly, appealed to the Connecticut Supreme Court. His principal claim was that many of Mrs. Alderman's "troubles were due to menopause."¹⁵⁷ Rather than flatly reject this implausible assertion, the Connecticut Supreme Court did not credit it because "the plaintiff had already passed through most of that condition."¹⁵⁸ It found sufficient medical evidence that her injuries must be attributable to the accident and not to menopause.¹⁵⁹ The court made no mention whatsoever of the eggshell plaintiff doctrine. Thus, even a ruling denying the menopause defense sent the unmistakable message that menopause, if factually proven, is a viable defense.

*Richey v. Service Dry Cleaners*¹⁶⁰ presented a similar case. Mrs. Louisa Richey was in the back seat of her automobile when her car was struck by a truck owned by Service Dry Cleaners.¹⁶¹

By the impact of the collision [Mrs. Richey] was violently thrown against the back of the front seat, rebounded against the back seat and fell to the floor in a semiconscious condition. She was immediately removed from the car and placed upon the ground beside the road. Witnesses who were then present testified that she was groaning and complaining loudly of pain in the back and chest. That she was suffering intensely was obvious to these witnesses, one of whom said: "You could see it in her face."¹⁶²

152. For a complete discussion of the legal tendency to connect women to emotional injury, even when the injuries have severe physical consequences, see Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH L. REV. 814 (1990).

153. See *Alderman v. Kelly*, 32 A.2d 66, 66-67 (Conn. 1943).

154. See *id.* at 67.

155. See *id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. 28 So. 2d 284 (La. Ct. App. 1946).

161. See *id.*

162. *Id.* at 285.

After the accident, Mrs. Richey had problems breathing, had redness and swelling on the left side of her chest, and was in great pain.¹⁶³ Within a few days, she was coughing up blood and showing discoloration of tissue, and immobility in her left arm.¹⁶⁴ Over a period of four months, she was hospitalized repeatedly, the last hospitalization lasting almost three weeks.¹⁶⁵

Under questioning from defense counsel, Mrs. Richey's own physician, Dr. Brian, testified:

Q. In the case of Mrs. Richey, you have testified you were treating her for menopause condition prior to this accident. Had that nervous disposition manifested itself already?

A. Oh, yes, very much so.

Q. She was of an extremely nervous state then prior to this accident?

A. That is right.

Q. What was that condition after that accident?

A. Exaggerated that much more. Any complaint or symptom she would get in the beginning would be immediately attributed to her previous accident. The actual amount of mental upset she had along with that, I think, had a great deal to do with her other symptoms following.

* * *

Q. It is natural that a person in that condition would form an exaggerated picture of a condition that would not be true in a normal person?

A. That is true. Anything that might happen to her, regardless of what it might be, during that time would, in her own mind, as far as her nervous condition is concerned and the fact that she was already nervous and upset, exaggerate anything she might have. This increase in nervousness she would have from anything like that could bring on other symptoms.

Q. Isn't that condition sometimes referred to as hysteria?

A. That is right.¹⁶⁶

A defense expert, Dr. Texada, found that:

After examining the hospital records and charts pertaining to Mrs. Richey's case, he was of the opinion that the greater part of the treatment administered to her was necessary on account of nervousness brought about by the transition through which she was passing, commonly called a "change of life."¹⁶⁷

163. *See id.*

164. *See id.*

165. *See id.*

166. *Id.* at 286.

167. *Id.*

Thus, while Mrs. Richey had clear, definable physical injuries resulting from a documented traumatic accident, her own physician testified in a manner that distorted the nature and degree of her compensable injury by attributing her continued suffering to a pre-existing "nervousness." By counting this testimony against Mrs. Richey, the court either was ignoring the eggshell plaintiff doctrine, or implying that it did not apply to pre-existing emotional conditions.

In a 1948 New York case, Mabel Schwarz was injured when she was struck by the defendant's automobile.¹⁶⁸ She sued for personal injury damages and her husband sued for loss of services. The proof as to the nature and extent of Mrs. Schwarz's injuries was uncontradicted.¹⁶⁹ At the close of the case, the jury returned a verdict of \$15,000 for Mabel Schwarz, and \$2500 for her husband.¹⁷⁰ The trial court reduced the verdict to \$8500 and \$1500 respectively.¹⁷¹ In a split opinion that affirmed a lower court ruling favoring the plaintiffs, two judges of the New York Supreme Court, Appellate Division, felt compelled to separately state that the case should have been reversed because the verdict "was contrary to the weight of the credible evidence to find that [Mrs. Schwarz's] emotional and nervous troubles were caused by this accident, particularly since her physical condition concededly is normal, and she is suffering from disturbances associated with the menopause."¹⁷²

In a Texas case decided a year later, the pattern continued. In *Airline Motor Coaches v. Green*,¹⁷³ Lillie Mae Green was a passenger on an Airline Motor Coach bus when the bus suddenly left the highway, crossed a ditch, and went through two fences before coming to a halt.¹⁷⁴ Injury to her head was extensive. Nash, a Dallas brain surgeon, testified that the pressure in Mrs. Green's brain was twice as high as it should be.¹⁷⁵ Doctor Nash also testified

that he found a difference in the reflexes of her right leg and arm as compared with her left leg and arm; that the grip in her right hand was much weaker than the left; that she had a depression in her head which he thought was in the scalp; that he examined her on two subsequent occasions with the same findings except that on the last time her right hand was weaker than it had been, going into details with reference to the examinations made and the result thereof, and stated that his

168. Schwarz v. Loew's Theatre & Realty Corp., 273 A.D. 898, 898 (N.Y. App. Div. 1948). The plaintiff was injured when she was hit by an automobile owned by the manager of a Loew's Theatre. The jury awarded her \$15,000. See *id.* The trial court reduced the award to \$8500. See *id.* On appeal, the reduction was affirmed by a majority of the court. *Id.* at 899. Nothing in the record reveals the reason for the \$7000 reduction.

169. See *id.*

170. See *id.* at 898.

171. See *id.*

172. *Id.* (Adel, Wenzel, JJ., concurring).

173. 217 S.W.2d 70 (Tex. App. 1949).

174. *Id.* at 71.

175. See *id.* at 72.

diagnosis was that she had a lesion in the left half portion of the brain due to trauma or injury.¹⁷⁶

With little regard to these concrete findings, the defendant attempted to blame Mrs. Green's troubles on menopause.¹⁷⁷ Mrs. Green, however, testified that she had gone through menopause, with no trouble, two years earlier.¹⁷⁸ She unequivocally stated that she

had always been able to do her housework, farm work and to do outside work for White people and that she earned from her farm or gardening work and in selling chickens, eggs and produce which she raised about \$500 per year; that since her injuries she had been unable to do any of that kind of work; that she had suffered much pain and still suffers with her head, neck, leg, arm and shoulder as the result of her injuries; sometimes feels crazy and her head and neck hurts; that she has a sink in the top of her head which was not there before the injuries, and that while at times she feels better the pain in her side and head never leaves her.¹⁷⁹

The Texas Court of Appeals ultimately held that: "Taking into consideration the devalued state of the dollar and its greatly decreased purchasing power, we are unwilling to say that the award of \$10,000 as damages was so excessive as to shock the conscience of the court."¹⁸⁰ The court basically sidestepped the menopause issue.

Finally, a divorce case of this period is noteworthy for its medical testimony. While some physicians favored a kindly, "stay at home" approach for the menopausal woman, others advocated far more interventionist treatment. Like the treatment of Dr. Gilman in *The Yellow Wallpaper*,¹⁸¹ the medical expert in *Glass v. Glass*¹⁸² testified that confinement to a sanitarium was a reasonable and appropriate treatment for the symptoms of menopause.¹⁸³ As the medical

176. *Id.* at 74.

177. *See id.*

178. *See id.*

179. *Id.* Mrs. Green's attorney appealed to the jury to "[d]o unto others as you would have them do unto you. You must give the same consideration to the Negro woman that you do to all the other evidence." *Id.* at 71.

180. *Id.* at 74.

181. *See* GILMAN, *supra* note 76.

182. 63 A.2d 696 (Pa. Super. Ct. 1949).

183. Rebuttal witness, Dr. Jones, testified as follows:

A. In dealing with women we must consider the menopause.

Q. It is not unusual is it, Doctor, as a woman approaches that period of her life and during it that she sometimes does things she never did before in her married life and sometimes the association toward the other spouse changes entirely?

A. That's right.

Q. Wasn't this a rather drastic treatment of this woman to submit her to various

establishment saw fit to isolate older women, so the legal establishment justified their devaluation.

Thus, although in the 1940s women were critical to American business and the war effort, and newspapers and magazines praised the industry and patriotism of *Rosie the Riveter* and the women she represented, the entrenched stereotypes of female physical and emotional instability did not die. On the contrary, they blossomed and were easily available for use against women in legal actions. Indeed, the menopause defense was raised with considerable frequency in this decade. Perhaps because women achieved some independence and status in the workplace, they were threatening to the social order, and the menopause defense became a vehicle to ensure that things did not change too much.

C. The 1950s—Back to the Home

In the 1950s, the menopause defense was litigated at the appellate level with half as much frequency as the previous decade. No clear usage pattern is apparent. The defense appeared in everything from basic negligence and workman's compensation cases to product liability actions.¹⁸⁴ Defendants fared well with the defense, with low monetary awards upheld or reduced on appeal frequently.¹⁸⁵ Although about fifty percent of the courts were not swayed by the allegations of menopausal syndrome, not one of those courts discredited the use of menopause as a defense.

The eggshell plaintiff rule continued to be ignored, and expert testimony basically still went unchallenged. A particularly unsupportable result and equally unsupportable language appears in a bus accident case from Louisiana, *Maroun*

sanitariums. Would that tend to eliminate the condition in any way?

A. Sure, that was the sort of treatment she required

Id. at 700. See also LECTURES ON CLINICAL PSYCHIATRY, *supra* note 78.

184. See, e.g., *Hirsh v. Manley*, 300 P.2d 588 (Ariz. 1956) (negligence, auto accident); *Four Branches, Inc. v. Oechsner*, 73 So. 2d 222 (Fla. 1954) (worker's compensation); *Laurel Coca Cola Bottling Co. v. Hankins*, 75 So. 2d 731 (Miss. 1954) (poisoned Coca-Cola); *Vogrin v. Forum Cafeterias of Am., Inc.*, 308 S.W.2d 617 (Mo. 1957) (slip and fall); *Brown v. Payne*, 264 S.W.2d 341 (Mo. 1954) (negligence, auto accident); *Pfautz v. Sterling Ins. Co.*, 135 A.2d 806 (Pa. Super. Ct. 1957) (insurance disability); *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955) (negligence, auto accident).

185. See, e.g., *Maroun v. New Orleans Pub. Serv., Inc.*, 83 So. 2d 397 (La. Ct. App. 1955) (finding verdict of \$1000 appropriate when accident could have aggravated pre-existing conditions and caused personality change); *Laurel Coca Cola Bottling*, 75 S.W.2d at 731 (upholding decision of \$12,000 damages awarded to plaintiff who drank poisoned Coca-Cola when she was passing through the menopause); *Vogrin*, 308 S.W.2d at 617 (finding verdict of \$1000, when plaintiff requested \$20,000, adequate because injuries plaintiff complained of could be attributed to other causes); *Brown*, 264 S.W.2d at 341 (finding verdict of \$10,000 excessive and reducing to \$7000 because plaintiff's chronic pain, lack of appetite, nervousness, and irritability could be attributed to other causes).

*v. New Orleans Public Service, Inc.*¹⁸⁶ When a New Orleans Public Service bus stopped abruptly to avoid hitting a pedestrian, Adele Maroun, a passenger, was thrown from her seat across the aisle where she hit her head on a steel stanchion.¹⁸⁷ She sustained multiple documented injuries to her teeth and mouth, abrasions, and contusions of her head, face, neck, body, knees, ankles and spine, as well as a change in her personality.¹⁸⁸ Ms. Maroun sued the city and asked for almost \$80,000 in damages.¹⁸⁹ The trial court awarded her \$1000.¹⁹⁰ In the face of overwhelming evidence supporting Mrs. Maroun's tangible injuries, the Louisiana Court of Appeals, nevertheless, found that the nominal award did substantial justice because: "[T]he record reveals a reasonable medical explanation for the personality change and innumerable aches and pains . . . in that her menopause occurred shortly after the accident, the endocrinological ramifications of which we deem it unnecessary to discuss here."¹⁹¹

It seems that by the 1950s attorneys for insurers found a receptive audience for the menopause defense, particularly among jurists who found the effects of menopause so "generally accepted" that it was within the court's own range of common experience and knowledge. In this favorable legal climate, attorneys for civil defendants would litigate these cases to the highest state courts in their efforts to eliminate, or reduce, the amounts that the insurers would have to pay to female plaintiffs who were at or about the age of menopause. To defendants' great benefit there was no shortage of medical experts ready and willing to testify to the connection between menopause and psychogenic disease.¹⁹²

One of the boldest and most shocking assertions of the menopause defense is found in a contaminated cola case. In *Laurel Coca Cola Bottling Co. v. Hankins*,¹⁹³ Ms. Gladys Hankins bought a bottle of Coke from the local store, and became violently ill upon her first sip. Some of the substance she "expelled" landed on her dress and a rug and "made holes in those articles."¹⁹⁴ The bottle of Coca-Cola was contaminated with sulfuric acid.¹⁹⁵ Ms. Hankins' mouth, tongue, and stomach were burned.¹⁹⁶ Ms. Hankins' doctor opined that Hankins

186. 83 So. 2d 397 (La. Ct. App. 1955).

187. *See id.* at 398-99.

188. *See id.* at 399.

189. *See id.* at 398.

190. *See id.* at 399-400.

191. *Id.* at 399.

192. *See, e.g.,* *Mayor of Beverly v. First Dist. Court of Essex*, 97 N.E.2d 181, 183 (Mass. 1951) (testifying medical expert stated that witness was not to be believed because she suffered from hysteria related to having recently passed through menopause); *Vogrin v. Forum Cafeterias of Am., Inc.*, 308 S.W.2d 617, 623 (Mo. 1957) (testifying doctor found that plaintiff's "menopausal symptoms . . . are serving to aggravate and prolong [plaintiff's] complaints").

193. 75 So. 2d 731 (Miss. 1954).

194. *Id.* at 732.

195. *See id.* at 733.

196. *See id.* at 732.

had "acute gastritis with neurasthenia."¹⁹⁷ When his treatment failed, the doctor concluded that the patient "was somewhat psychotic."¹⁹⁸ A gastroscopic exam and exploratory surgery performed by a consulting physician revealed that the upper third of Ms. Hankins' stomach was inflamed.¹⁹⁹ Contrary to his colleague, this doctor found that Ms. Hankins "was not psychotic, but . . . sustained a physical injury."²⁰⁰

At trial, the Coca-Cola defense team presented expert testimony that because Ms. Hankins was menopausal and receiving estrogen injections every two weeks, her symptoms were attributable to her menopause and to the estrogen she was taking.²⁰¹ Thus, the company attempted to shift the blame while brazenly asserting that the poison contaminated Coca-Cola that Ms. Hankins had ingested should not be blamed for her injury.²⁰² The defense failed, but the courtroom climate that allowed it to be raised remained.

D. The 1960s and Beyond—Changing Times

Of the ten cases to reach appellate courts²⁰³ during the 1960s, there was much of the same pleading, the same unchallenged medical testimony, and the same absence of discussion of the eggshell plaintiff doctrine found earlier. One case, however, is exceptional for the court's edified reaction to the defendant's claim that the plaintiff's complaints were related to menopause—*Merritt v. Hemstead*.²⁰⁴ The trial judge ruled that "'unproved theories' about the neurosis being caused by such factors as the menopause" could not result in a holding for the defendant.²⁰⁵ This late 1960s decision, which interestingly was upheld by the Louisiana Court of Appeals (the same jurisdiction that thirteen years earlier decided *Maroun v. City of New Orleans*²⁰⁶), marks the first sign of change in

197. *Id.*

198. *Id.*

199. *See id.* at 733.

200. *Id.*

201. *See id.* at 734. The Mississippi Supreme Court upheld the judgment for Ms. Hankins, finding that she suffered a substantial and painful injury. *Id.* at 736.

202. *See id.* at 733.

203. *See* Appendix; *see also* *Scroggins v. United States*, 397 F.2d 295 (Cl. Ct.), *cert denied*, 393 U.S. 952 (1968); *Beyer v. City of Dubuque*, 139 N.W.2d 428 (Iowa 1966); *Shepherd v. McGinnis*, 131 N.W.2d 475 (Iowa 1964); *Cimijotti v. Cimijotti*, 121 N.W.2d 537 (Iowa 1963); *Montgomery v. Manos*, 440 P.2d 629 (Kan. 1968); *Merritt v. Hemstead*, 206 So. 2d 718 (La. Ct. App. 1968); *Glass v. Flowers*, 149 So. 2d 747 (La. Ct. App.), *cert. denied*, 151 So. 2d 690 (La. 1963); *Johnson v. Gulfport Laundry & Cleaning Co.*, 162 So. 2d 859 (Miss. 1964); *Fielder v. Production Credit Ass'n*, 429 S.W.2d 307 (Mo. Ct. App. 1968); *Worthen v. Worthen*, 374 S.W.2d 935 (Tex. App. 1964).

204. 206 So. 2d 718 (La. Ct. App. 1968).

205. *Id.* at 721 (emphasis added).

206. 83 So. 2d 397 (La. Ct. App. 1955) (awarding nominal damages to a woman injured in a bus accident because "her menopause occurred shortly after the accident"). *See supra* notes 179-

judicial attitude with reference to the effects of menopause upon women. The defendant's primary assertion was that "plaintiff's neurosis was caused by the menopause, years of hard work, financial problems and worry over her husband's illness and various disappointments in connection with her children."²⁰⁷ Supporting the trial judge, the appellate court wrote: "[W]e find that the trial judge's interpretation of the medical evidence is correct and led him to the proper conclusion that the traumatic neurosis was caused by the accident."²⁰⁸

Accident related negligence actions that relied on the menopause defense that reached the appellate level in the 1970s were met with mixed reception. However, more often than not, even in this decade, the defense achieved moderate, limited success. Although societal and judicial attitudes towards women slowly were changing, the record of these cases, nonetheless, is replete with references to emotional problems attributable to menopause,²⁰⁹ nervous conditions related to menopause,²¹⁰ menopausal melancholia,²¹¹ and keratoconjunctivitis caused by menopause.²¹²

The defense appeared in product liability, workman's compensation, and other negligence actions. It was raised, with varying degrees of success in different states, including Illinois,²¹³ Kentucky,²¹⁴ and Missouri.²¹⁵ However, in the 1960s and 1970s the menopause defense found some of its most fertile ground in divorce courts.

Until the early to mid-1970s, in most states to be granted a divorce one of the parties had to be found guilty of some misconduct.²¹⁶ In the rare case of a proceeding in which both parties were found to be guilty of misconduct, a

83 and accompanying text.

207. *Merritt*, 206 So. 2d at 720.

208. *Id.* at 721.

209. *Braun v. Ford Motor Co.*, 363 A.2d 562, 565 (Md. Ct. Spec. App. 1976) (referring to a newspaper article related to the "emotional [stress] of women during menopause").

210. *Devillier v. Traders & Gen. Ins. Co.*, 321 So. 2d 55, 57 (La. Ct. App. 1975) (stating that menopause caused plaintiff to be nervous).

211. *McCommon v. Hennings*, 283 N.W.2d 166, 169-70 (N.D. 1979) (establishing that menopausal melancholia could be the cause of plaintiff's complaints, making her irritable).

212. *Maryland Cas. Co. v. Davis*, 464 S.W.2d 433, 436-37 (Tex. App. 1971) (attributing keratoconjunctivitis to hormone changes in women over the age of forty).

213. *Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259, 262 (Ill. 1946) (stating that an injury sustained after being hit by a four-foot long 75 metal guardrail, caused plaintiff's injury, not "change of life").

214. *Day v. Rains*, 220 S.W.2d 575, 575-76 (Ky. Ct. App. 1949) (finding that rusty, used, razor blade in Pepsi-Cola that plaintiff drank caused injury, not menopause).

215. *Hanson v. City Light & Traction Co.*, 178 S.W.2d 804, 811-12 (Mo. Ct. App. 1944) (alleging that plaintiff's symptoms were due to menopause and gall bladder trouble, not escaping gas from recently installed gas furnace).

216. See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 350 (1968); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

divorce could be denied by the court and the parties forced to remain married.²¹⁷ Presenting grounds for which a divorce would be granted was a problem in many states. This was further complicated by the fact that the guilty party in a divorce was punished. The husband, if found guilty of adultery or other serious offenses, might be required to pay expensive alimony for the rest of his life.²¹⁸ On the other hand, a wife found guilty of misconduct could be denied alimony altogether,²¹⁹ and face losing custody of any children. Divorce required fault grounds; and because a divorce based on fault grounds could lead to a financial windfall for one party and financial ruin for the other, and because child custody also could be at stake, the menopause defense was used on both sides of the aisle in the divorce courtroom.²²⁰

Parties asserted and courts entertained sundry arguments attributing discontent and even abuse to menopause—regardless of whether it was supported by expert medical testimony.²²¹ Defendants claimed, and courts admitted testimony such as: her menopause caused her to question her husband's fidelity,²²² her menopause made him physically abuse his wife.²²³ Although in the 1960s America was in the midst of a great social upheaval and so-called enlightenment, little of this change was reflected in the divorce courts. Only with the move away from fault to no-fault divorce in the early 1970s did the menopause defense finally find its demise in the divorce arena.²²⁴ However, the legacy of the menopause divorce cases lived on.

217. See, e.g., *Clark v. Clark*, 225 P.2d 147 (N.M. 1950), *overruled by* *Garner v. Garner*, 512 P.2d 84 (N.M. 1973).

218. See Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 146 (1980).

219. See *id.*

220. See, e.g., *Danner v. Danner*, 206 So. 2d 650, 651 (Fla. Dist. Ct. App. 1968) (asserting that his wife's grievances were related to her menopause); *Cimijotti v. Cimijotti*, 121 N.W.2d 537, 541-42 (Iowa 1963) (attempting to attribute wife's nervous condition and fear to her menopause rather than to abuse by her husband throughout the course of their marriage); *Gray v. Gray*, 24 S.E.2d 444, 445 (Va. 1943) (defending wife stated that menopause made her so ill that adultery was impossible).

221. See, e.g., *King v. King*, 152 So. 2d 889 (Miss. 1963) (denying wife separate maintenance after she left the marital home subsequent to her husband striking her; wife's menopause was placed at issue and the court held that husband's treatment of her was not cruel under the circumstances and denied award to the wife by reversing the holding of the lower court); *Worthen v. Worthen*, 374 S.W.2d 935, 936 (Tex. App. 1964) (recounting that the defendant husband denied the conduct the plaintiff attributed to him and argued that his wife's menopause caused her to "become withdrawn and erratic in her conduct").

222. See *King*, 152 So. 2d at 890.

223. See *Worthen*, 374 S.W.2d at 936.

224. See Henry H. Foster, Jr., *Divorce Reform and the Uniform Act*, 18 S.D. L. REV. 572 (1973); Hon. Ralph T. Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S.D. L. REV. 601, 603 (1973).

E. It's Her Hormones

Courts, with guidance and acquiescence of the medical profession, came to find menopause a reasonable defense for almost anything, including aberrant behavior, physical and/or mental illness, and emotional hardship. If a woman brought suit to redress some injury, her hormones could become the issue.

In 1964, the Iowa Supreme Court reversed and remanded a medical malpractice action where the jury awarded \$20,000 to the female plaintiff.²²⁵ The defendant physician used contaminated sutures to repair a surgical incision after removing an ovarian cyst.²²⁶ As a result of the subsequent infection, the plaintiff's operative wound ruptured and remained open and draining for about a year after the surgery.²²⁷ Nevertheless, the court found merit in the defendant's contention that the \$20,000 award to the plaintiff was so large that it shocked the conscience of the court.²²⁸

Relying upon the defendant's medical witnesses, the court concluded that the plaintiff's symptoms were related to a host of other causes including "menopausal syndrome."

There is no evidence that the plaintiff was permanently injured. She did suffer annoyance, discomfort and pain for some time following the . . . operation. How much of this was caused by infection from the sutures rests wholly in speculation and conjecture. Much of her disability must be attributed to other causes—weakness that would have followed the operation in any event, bleeding hemorrhoids, cerebral hemorrhage, *menopausal syndrome*, and diseased gall bladder.²²⁹

Employers who sought to deny workman's compensation claims of female workers utilized menopause to limit or eliminate recovery of damages by claimants who were at or near the age of menopause.²³⁰ In *Shilling v. State Accident Insurance Fund*, when Ms. Shilling, an overworked fifty-four-year-old employee for the Oregon Department of Motor Vehicles, began experiencing stress, chest pains, and other associated complaints while at work, she sought compensation for an emotional disability.²³¹ The compensation board argued that the emotional disability did not arise out of the course of her employment.²³² Rather, they claimed that her work stress was no different from other employees, and that Ms. Shilling's real stress occurred because "[s]he was concerned with

225. *Shepard v. McGinnis*, 131 N.W.2d 475 (Iowa 1964).

226. *See id.* at 476.

227. *See id.* at 477.

228. *Id.* at 479.

229. *Id.* (emphasis added).

230. *See, e.g., Shilling v. State Accident Ins. Fund*, 610 P.2d 845, 846 (Or. Ct. App. 1980); *see also Olin Indus., Inc. v. Industrial Comm'n*, 68 N.E.2d 259 (Ill. 1946).

231. *Shilling*, 610 P.2d at 846-47.

232. *See id.* at 846.

menopause, obesity and bronchitis.”²³³ The 1980 Oregon Court of Appeals disagreed and found that Ms. Shilling’s stress arose from her job, not her physiology or anatomy.²³⁴

Insurance companies utilized menopause as a defense when sued as a consequence of denial of benefits payments to, or on behalf of, their insured. Noteworthy among these cases is one in which a company claimed bad faith on the part of its insured because she failed to list her treatment for menopause on her application for insurance.²³⁵ In another insurance benefits case, the insurer denied life insurance proceeds to a common law wife. The insurer contended that because the claimant was menopausal, she and the insured could not have been living as husband and wife; therefore the plaintiff could not qualify as the recipient of the proceeds of a policy that named the decedent’s “wife” as the beneficiary.²³⁶

The menopause defense even found its way into custody actions. There were two reported cases during the 1960s.²³⁷ One of these cases is remarkable, not for the custody determination, but rather for the insight it yields into the still sanctioned treatment for menopause. In medical testimony we learn that just thirty years ago, shock therapy and hysterectomy to cure the “involutional melancholia” of menopause were routinely employed treatments.²³⁸

233. *Id.*

234. *Id.*

235. *See Pfautz v. Sterling Ins. Co.*, 135 A.2d 806, 808 (Pa. Super. Ct. 1957) (holding that the plaintiff’s failure to report occasional visits to her doctor for treatment of menopause on her insurance application did not rise to the level of bad faith, and affirming the jury verdict in favor of the plaintiff).

236. *See Stewart Co. v. Christmas*, 79 So. 2d 526, 527 (Miss. 1955). The issue in this case was whether the plaintiff was living with the insured at the time of his death and therefore qualified as a dependent widow under the Workman’s Compensation Act. The Mississippi Supreme Court, holding for the plaintiff, ruled that:

Although [the] appellee said that she and her husband for the past several years had not had a sexual relationship in their marriage, she stated that this was because she was passing through the menopause period of life. Although that type of relationship in a marriage is unusual, it is not essential to establish the requirement that the husband and wife are “living with” each other, where the other conditions and circumstances of a marriage relationship exist.

Id. at 528.

237. *See In re Hicks v. Deer*, 222 So. 2d 82, 84 (La. Ct. App. 1969); *In re St. John*, 272 N.Y.S.2d 817, 823 (N.Y. Fam. Ct. 1966), *rev’d by Fitzsimmons v. Luini*, 274 N.Y.S.2d 798 (N.Y. App. Div. 1966).

238. *See In re St. John*, 272 N.Y.S.2d at 823.

III. THE DEMISE OF THE MENOPAUSE DEFENSE

A. Putting Socio/Cultural Foundations for the Menopause Defense in Historical Context

In the universal consciousness of western society, from prehistoric times through most of the Twentieth Century, a woman's mind and the function of her body were closely linked.²³⁹ Hippocrates believed that women were of a colder and less active disposition than men and could not sweat enough to remove impurities from their blood. Thus, menstruation was a female way of purification.²⁴⁰ That view was also common in the Sixteenth Century.²⁴¹ As Twentieth Century legal cases indicate, vestige of this ancient perception persisted to modern times.²⁴² To account for the rise and then virtual demise of the menopause defense, its socio/cultural context is elucidating.

Women in western society historically have been in a place apart. With home and hearth traditionally their only proper domain, most women were denied the life choices, options, education, and opportunities that were available to men. The birth of a female child was usually not greeted with the same celebration attendant with the birth of a son.²⁴³ From birth on, the position and role of a female was stratified.²⁴⁴ She was relegated to the home where she was considered fit for the performance of domestic tasks. She started life as the property of her father, who in some cultures had the power to choose whether she would live or die.²⁴⁵ She was valued within her family primarily for her father's ability to form an alliance with another family through an advantageous marriage,

239. Anthropologist Emily Martin discusses the underlying metaphors of production, laborer, and product found in medical and scientific discourse. She notes the impact of these dominant metaphors in medical discourse that portray a woman's body as a hierarchical, bureaucratically organized system under control of the cerebral cortex and a manufacturing plant designed for production of babies. To the extent the female body was like a machine designed to produce something, it, and therefore her mind, were broken or diseased when production ceased. See MARTIN, *supra* note 22, at 51-52.

240. See *id.* at 31.

241. See *supra* notes 53-54 and accompanying text.

242. See, e.g., Ingrassa, *supra* note 68, at 44. See also Deborah W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615, 632 (1988) (questioning whether hormonal disorders should establish a legal defense).

243. For example, the period of purification required for a woman after the birth of a daughter was twice as long as that required after the birth of a son. *Leviticus* 12:2-5, *supra* note 57.

244. Systems of primogeniture evolved, giving to the eldest son the exclusive or superior right to succeed to the estate of his ancestor. See BLACK'S LAW DICTIONARY 1072 (5th ed. 1979).

245. Roman law gave the father power to kill his daughter if he thought it fit. A Roman husband wrote his wife, Alis, in Egypt in 1 B.C. "If—good luck to you!—you bear offspring, if it is a male let it live; if it is a female, expose it." BONNIE S. ANDERSON & JUDITH P. ZINSSER, A HISTORY OF THEIR OWN, WOMEN IN EUROPE FROM PREHISTORY TO THE PRESENT 30, 34 (1st ed. 1988).

and for the possibility that she might one day bring forth sons. Even today, in parts of the world male babies are so preferred that female infanticide is a common problem.²⁴⁶

As recently as the mid-1800s, females went from a child in the possession and control of her father, to a *femme-couvert*—a woman under the protection and influence of her husband.²⁴⁷ Women's legal status throughout life was similar to that of a simple-minded child. They could not enter into contracts, nor exercise control over their bodies, destiny, or possessions. They were not educated because they were considered to be intellectually inferior.²⁴⁸

However, the Nineteenth Century saw significant change in American laws pertaining to women. In the early part of the century, a single American woman might have trusts, marriage settlements, contracts, business agreements, and wills, but when she married, her husband came into possession of all that she owned including any money that she might have had.²⁴⁹ It was possible for a single woman to arrange an antenuptial agreement prior to marriage that would place her premarital assets in trust during her coverture,²⁵⁰ but this only could be accomplished with full disclosure and complete consent of her prospective husband.²⁵¹ With this exception there were few, if any, devices available to a

246. See, e.g., Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An) Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1992).

247. Blackstone writes:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything; and is therefore called in our law—french a *femme-couvert* . . .

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 430 (Univ. of Chicago Press, 1979).

The powers of the father . . . vary from one society to another Whether tyrannical or liberal, however, the father decides, controls, and sees that his law is enforced. . . .

[F]athers exchange their daughters for daughters-in-law (or brothers exchange their sisters for wives), with or without the consent of the parties concerned. Gradually, women became commodities. They were bought and sold, and were the property of their husband. . . . [T]he patriarchal society in its most absolute form . . . strict[ly] control[s] female sexuality. Female adultery is an obsession with the men. The idea of bequeathing their name and property to a child of alien blood so appalls them that they will commit the worst extremities on the person of their wives to avoid such an outrage.

ELISABETH BADINTER, *THE UNOPPOSITE SEX: THE END OF THE GENDER BATTLE* 59 (Barbara Wright trans., Harper & Row Publ., 1989).

248. See generally BADINTER, *supra* note 247, at 88-102 (describing biblical and other early historical views of women).

249. See LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 36-37 (1969); John D. Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equity*, 47 N.Y.U. L. REV. 1033 (1972).

250. See KANOWITZ, *supra* note 249, at 38-40.

251. See *id.*

married woman to protect her property prior to the Married Women's Property Acts.²⁵² With the passage of the first Married Women's Property Act,²⁵³ American women began to have some measure of control over their property. Beginning around 1840, married women went from *being* property to being able to hold property after marriage.²⁵⁴ This period also saw major changes in divorce, custody, and probate laws that gave greater rights to women.²⁵⁵

By the early 1920s, women had better access to education and more women were employed in occupations outside the home than ever before.²⁵⁶ Aside from their roles²⁵⁷ as wife and mother, by virtue of their employment in business and industry, they became an economic force. Women progressed from being legally incompetent to being able to contract, sue, or testify in their own behalf and gained some control over these and other aspects of their lives. Nevertheless, the way in which women and their function were perceived by society changed very little.²⁵⁸

252. See Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Century*, 6 HUMAN RIGHTS 125, 131 (1976-1977).

253. The first Married Woman's Property Act was passed in Mississippi in 1839 and other states followed by 1850. Act of Feb. 15, 1839, ch. 46, 1839 Miss. Laws 72. See, e.g., also Act of June 10, 1845, ch. XXXIX, 1845 Conn. Acts 36; Act of Jan. 2, 1846, ch. 53, 1845 Iowa Terr. Acts 40 (1846); Act of Feb. 23, 1846, ch. 368, 1845 Ky. Acts 42 (1846); Act of Mar. 1, 1842, ch. 161, 1841 Md. Laws (1842). See generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398-1400 & nn.200-09 (1983).

254. See, e.g., TEX. CONST. of 1845 (stating that "laws shall also be passed providing for the registration of the wife's separate property"). The Married Woman's Property Acts, enacted first in Mississippi then followed by New York and other states gave wives the right to sue and be sued and included their wages as part of their separate estate. Act of Feb. 15, 1839, ch. 46, 1839 Miss. Laws 72, 72-73; 1848 N.Y. Laws ch. 200, 1848 N.Y. Laws 307, 307-08.

255. See generally KANOWITZ, *supra* note 249.

256. Wilson, *supra* note 252, at 133.

257. "Role" or "social role" is a term taken over from anthropology and sociology, where it referred primarily to the behavior prescribed as appropriate for persons of specified age and sex. Ralph Linton identified seven such roles in all societies: infant, boy, girl, adult man, adult woman, old man, old woman. See S. STANSFELD SARGENT & KENNETH R. STAFFORD, *BASIC TEACHINGS OF THE GREAT PSYCHOLOGISTS* 297-98 (1965).

258. See *Muller v. Oregon*, 208 U.S. 412 (1908) (determining the constitutionality of a 1903 Oregon statute that limited the number of hours that a woman would be allowed to work to 10 hours per day). This opinion, is remarkable for the insight that it provides about the societal perception of women of that time in general, and about perceptions of a woman's proper function as part of the labor force as it might affect her "natural" function as a producer of children.

That [a] woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work . . . tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of [a] woman becomes an object of public interest and

A woman's mind was still thought to be controlled and limited by the functions of her body, which was related to her ability to conceive and bring forth children.²⁵⁹ Ironically, during this period of dramatic legal and economic improvement restrictive abortion laws were first enacted.²⁶⁰ Thus, women found themselves in greater control of their property, but with less control over their bodies. Because men, up to this time, always had legal control over women perhaps it is not surprising that as women gained legal rights to property other rules to control and dominate women arose.²⁶¹ Laws banning abortion, for example, are one manifestation of society's reluctance to fully relinquish control over women.²⁶² The emergence of the menopause defense in the early Twentieth Century perhaps is another.

In effect, women went from being legally incompetent, to a condition where value and compensation could depend upon whether they were pre-menopausal, menopausal, or post-menopausal.²⁶³ However, as medical views on women's hormonal function became more enlightened, the societal perception that a women's mind was controlled predominantly by her physical functions also slowly began to change.

care in order to preserve the strength and vigor of the race.

. . . [H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms . . . has continued to the present. As minors [are,] . . . she has been looked upon in the courts as needing especial care . . . [and] in the struggle for subsistence she is not an equal competitor with her brother [L]ooking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.

Id. at 421-22.

259. *See id.* at 421.

260. In 1821, Connecticut became the first state to enact a law that restricted abortion after quickening. Conn. Stat., tit. 20, § 14 (1821) (revised by Conn. Pub. Acts, c. 71, § 1 (1860)). *See generally* Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (discussing history and context of abortion laws).

261. A giant step forward in the creation of laws that granted certain rights to women may easily be modified and diminished by the mind set of the courts, the professionals upon whom the courts must rely, and by the perception of the public. *See, e.g.,* Chused, *supra* note 253, at 236-43 nn.1404-05.

262. *See generally* MARVIN GLASKY, *ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA* (Regnery Pub. 1995) (1992) (describing, generally, the history of abortion in the United States).

263. Perimenopausal is the "term used to designate the transition phase between regular periods and no periods at all." Flora Johnson Skelly, *Millions in Menopause*, AM. MED. NEWS, July 27, 1992, at 29, 29 (quoting SHEEHY, *supra* note 43).

B. Shifting Medical Views

Assertion of menopause as a defense inextricably was linked with the prevalent views of the medical community with respect to older women's physical and emotional functioning. During the period when the denormalization and disease/deficiency model of menopause was generally accepted, courts admitted and credited evidence of menopausal syndrome. A California case from the early 1970s involving a hospital resident's claim for unjust dismissal from a psychiatric residency program foreshadowed changing views of the medical community with respect to menopause as illness.

In *Walker v. State Personnel Board*,²⁶⁴ Dr. Sidney Walker, a psychiatry student, was dismissed from his residency program apparently for overly relying upon views of women's emotional nature commonly accepted at the time. He was cited for inefficiency because of his "tendency to over-emphasize physical factors and under-emphasize psychological dynamic environmental factors."²⁶⁵ Dr. Walker's evaluators specifically found that he focused too much upon a female patient's menstrual status to the exclusion of environmental circumstances and emotional distress. His supervisor wrote:

[His] discussion focused not upon the traumatic environmental circumstances of the patient, her overt emotional distress, nor the dynamic understanding of her situation, but rather [his] discussion entirely focused upon the issue of whether she was currently menopausal or menstruating and if menopausal [he] wondered if there was sufficient emphasis on steroid replacement therapy in order to cure this patient's distress.²⁶⁶

Dr. Walker brought suit challenging his dismissal. The California Court of Appeals reinstated him to the residency program. While making no overt evaluation on the quality of Dr. Walker's medical skill, it did say: "We find it intolerable that Dr. Walker's dismissal should be upheld because his views failed to conform to current theoretical dogma on the causes of mental illness."²⁶⁷

The precedential value of the ruling to reinstate Dr. Walker is modestly significant; however, the insight it provides into shifting perspectives within the medical profession (at least the psychiatric specialty) is notable. Unlike their predecessors who created the diagnosis of and treatment for involutional melancholia, Dr. Walker's supervisors were unsatisfied to subsume psychological and biological causes of illness to menopause. Moreover, they refused to tolerate a student who attributed somatic and emotional complaints solely to endocrine function. The courts, traditionally slow to react to change, failed to get the message in the *Walker* case, but that was forced to change.

264. 94 Cal. Rptr. 132 (Cal. Ct. App. 1971).

265. *Id.* at 135.

266. *Id.*

267. *Id.*

C. The Medical Connection Between Menopause and Mental Capacity is Severed

"In 1980, the American Psychiatric Association [("APA")] removed 'involutorial melancholia,' a mental disease that supposedly struck at menopause, from its list of psychiatric diagnoses."²⁶⁸ Although this action did not immediately erase the denormalization of menopause or the cultural stereotype and negative perception of the menopausal woman, it had a major impact upon litigation. Litigants could no longer assert the menopause defense with relative ease. Once "involutorial melancholia" was eliminated from the APA list of recognized psychiatric pathology, medical witnesses could no longer automatically testify about menopausal syndrome.

After this medical development in 1980, menopause figured prominently as a defense in only two appellate level cases—a workman's compensation case,²⁶⁹ and a negligence action related to an automobile accident.²⁷⁰ In each, the menopause defense was used in a very tentative fashion, almost as an afterthought.

The connection between menopause and mental incapacity was severed. No longer could a negligent defendant successfully claim that menopause was the cause of a mental condition that made women at or near a certain age subject to a host of imaginary emotional and physical disorders. Without information gleaned from expert witness testimony on medical matters, litigants could no longer rely on the menopause defense.

D. Contextual Socio/Cultural Factors—"Baby Boomers" Go To College

Along with the deletion of "involutorial melancholia" from psychiatric diagnosis, a variety of social and cultural factors also worked to bring about the demise of the menopause defense. Perhaps the most prominent among these was that after *Rosie the Riveter* left the workplace at the end of World War II, she went back to the home and had children. These children constituted what we now refer to as the "Baby Boomer Generation." As would be expected, at least half of these children were female. These children grew up in a very different world, with different expectations from that of their mothers. Thanks to the

268. Griffin, *supra* note 73, at 61.

Depressions occurring in the menopausal years do not fit the description in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Edition 2. Depressed patients who are in the menopausal years do not have a distinct symptom pattern, an absence of previous episodes, or an absence of life-stress precipitants. The evidence thus far supports the decision to exclude involutorial melancholia, as currently defined, from the forthcoming *Diagnostic and Statistical Manual of Mental Disorders*, Edition 3.

Myrna M. Weissman, *The Myth of Involutorial Melancholia*, 242 JAMA 742, 742 (1979).

269. Shilling v. State Accident Ins. Fund, 610 P.2d 845 (Or. Ct. App. 1980).

270. Hayes v. Commercial Union Assurance Co., 459 So. 2d 1245 (La. Ct. App. 1984).

Servicemen's Readjustment Act of 1944, popularly known as the G.I. Bill,²⁷¹ colleges and universities greatly expanded their facilities to accommodate the educational requirements of the men returning from the war. When the returning soldiers completed their educations, these institutions found themselves with empty seats, and for the first time actively recruited female students to fill them. Thus, women of the Baby Boom had greater access to higher education, and grew into better educated, more assertive women.²⁷² Their horizons expanded, and these educated women were less likely to settle for an answer of "that's the way it is, because that's the way it has always been." Educated women asked questions, and expected sound, rational answers. As might be expected, as these women went through different stages of their lives their questions changed.

When they completed their college educations, many went on to professional school.²⁷³ As a result of their growing education and willingness to discuss their bodies,²⁷⁴ women began to take control. They rejected the doctrine that father, husband, and physician knew what was best for them. They chose to be awake and active, rather than anesthetized and passive, during childbirth. Also, they generally demanded what they considered best for themselves and for their babies.²⁷⁵ Physician's views of women also began to change, particularly as more women entered the medical profession.

By the end of the 1970s, women, who may have heard their mother's stories about menopause, began to realize that one day they would experience this biological change. This group, which expected to lead productive lives well past the age of menopause, set out to dispel the age-old myths that were associated with menopause. They were not going to dry out, dry up, or go away. They would refuse to wear the mantle of the useless crone.²⁷⁶ Certainly they were not

271. 58 Stat. 284 (1944).

272. See Ingrassa, *supra* note 68, at 44 (describing, generally, women of the baby boomer generation).

273. Prior to, and even in the early years after the war, very few women were admitted to post graduate education. See Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1173 (1988) ("Many professional schools retained rigid quotas on female applicants and some institutions (including, for example, Harvard Law School and most hospital internship programs) remained totally inviolate as late as 1950.").

274. See, e.g., RUTH BELL ET AL., *CHANGING BODIES, CHANGING LIVES* (rev. & updated ed. 1987) (1981); THE BOSTON WOMEN'S HEALTH COLLECTIVE, *OUR BODIES, OURSELVES* (2d ed. 1976).

275. An interesting aside is that beginning in the early 1970s husbands were allowed into labor and delivery rooms. The ostensible reason for men being permitted this privilege was to comfort their wives and bond with their newborn children by participating in the birthing process. This great advance may have had much more to do with the fact that a woman who is awake during labor and delivery, is a woman who is a problem for her physician because she asks questions. The real point of the presence of the father may be to keep the mothers quiet.

276. Germaine Greer titled one chapter in her book *The Change, Sex and the Single Crone*. GREER, *supra* note 40, at 280. One critic wrote: "As for Greer . . . she must have had some pretty bitter experiences even to consider writing a chapter entitled "Sex and the Single Crone: . . . poor

going to be considered crazy as they passed through one of the normal stages of life.²⁷⁷

Women organized into women's interest groups, and for the first time possessed the power to demand and get action on issues that were of importance to them.²⁷⁸ While equal educational and employment opportunities were at the forefront of the issues that brought women together, child care, abortion rights, and women's health concerns, including menopause also were addressed. Menopause support groups formed, and helped to dislodge the old menopause myths from the minds of women.²⁷⁹ These newly empowered women then reached out to the rest of society in an effort to create a new image for the menopausal woman.²⁸⁰

Menopause does not occur completely without symptoms. Symptoms of menopause, which are many and varied, run the gamut from mild to severe.²⁸¹ But, as the psychiatric community recognized in 1980, there is no distinct symptom pattern. Moreover, only in the rarest of cases do these symptoms have a major lasting and debilitating influence upon a woman's life.²⁸²

Today, menopause is in the embryonic stages of being recognized for the passage that it is.²⁸³ Although elements of the medical community, with significant encouragement from the pharmaceutical industry,²⁸⁴ still treat menopause as a disease that needs to be cured, differing views of menopause are

Germaine!" Kiki Olson, *Hot Flashes*, INSIDE, Fall 1993.

277. See Logothetis, *supra* note 83, at 45-46.

278. See, e.g., Campaign for Women's Health, Washington, D.C. (a political action committee devoted to women's health issues); 1 in 9 Breast Cancer Group (a political action group devoted to lobbying for more money and attention to breast cancer); National Organization for Women ("NOW") (a lobbying group dedicated to establishing equal treatment for women); National Abortion Rights Action League ("NARAL") (a lobbying for abortion safety, legality, and equal access).

279. See PAULA B. DORESS-WORTERS & DIANA LASKIN SIEGAL, *OURSELVES, GROWING OLDER: WOMEN AGING WITH KNOWLEDGE AND POWER* 127 (1994).

280. See *generally id.*

281. Changes just before menopause include: deviations in duration of menstrual cycle; periods may be longer or shorter; flow can be heavier or lighter. See Griffin, *supra* note 73, at 61. Changes during menopause include: menstrual periods stop; the average age is 51; up to 75% of all women experience hot flashes, these may begin up to 18 months prior to menopause, they last for up to a few minutes and occur from several times a day to a few times a month; night sweats sometimes accompany hot flashes, which are most common in the first year or two of menopause and are related to estrogen withdrawal; some research has connected the loss of estrogen to a decrease in REM sleep. See *id.*

282. See DORESS-WORTERS & SIEGAL, *supra* note 279, at 118-32.

283. "Menopause is not something women need to be afraid of. It is a perfectly normal and natural part of life: like puberty, like childbirth." Phyllis J. Sturges, Letter to the Editor, *Menopause: A Normal, Natural Part of Life*, N.Y. TIMES, June 1, 1992, at A16.

284. See, e.g., CONEY, *supra* note 39, at 185-86.

accepted.²⁸⁵ One school of thought is that even though menopause does not make women insane, it does have significant physical, emotional, and behavioral symptoms that require aggressive hormone replacement treatment.²⁸⁶ Another view is that there is “nothing unique about menopause that may result in particular types of behavior or mood syndromes.”²⁸⁷ This later view is supported by a five-year epidemiological study that followed 2500 Massachusetts women at the age of menopause. The New England researchers found that menopause had no major impact on health or behavior.²⁸⁸ However, one study is insufficient to reverse eras of misunderstanding. Since no serious systematic studies of menopause were undertaken until 1980, the National Institute of Health urged additional research.²⁸⁹

Those “Baby Boom” era women, now peri-menopausal, unable to obtain higher education when they were young, are returning to school in record numbers now that their families are grown. Among those who had the advantage of an education earlier in life, many have gone on to have successful careers in professions, business and industry. Women at the age of menopause today occupy high profile positions in television broadcasting and publishing.²⁹⁰ Also, women at the age of menopause serve as judges at every level from municipal

285. See Nicola Tyler, *Health: Mind Over Menopause*, DAILY TELEGRAPH, May 22, 1990, at 13; see also CRAWFORD & UNGER, *supra* note 75, at 236 (discussing the medicalization of menopause to the neglect of the positives as well as negatives (emotional and financial) involved in women’s middle and old age).

286. Aggressive treatment no longer means shock therapy, institutionalization, or massive doses of mind altering drugs. Today, it is more likely to mean small doses of estrogen, calcium supplements to ward off osteoporosis, and recommendations for regular exercise. See, e.g., MARIAN VAN EYK MCCAIN, *TRANSFORMATION THROUGH MENOPAUSE* 118-19 (1991). See also N.E. Avis & S.M. McKinlay, *A Longitudinal Analysis of Women’s Attitudes Toward the Menopause: Results from the Massachusetts Women’s Health Study*, MATURITAS, Mar. 13, 1991 at 65.

287. Rovner, *supra* note 74, at Z20 (quoting Dr. David R. Rubinow, Clinical Dir. of the Nat’l Institute of Mental Health).

288. The results of various components this ongoing study have been reported from 1986 through 1992 by the New England Research Institute. See Sonja M. McKinlay et al., *The Normal Menopause Transition*, MATURITAS, Jan. 14, 1992, at 103; see also Avis & McKinlay, *supra* note 286, at 65; John B. McKinlay et al., *Health Status and Utilization Behavior Associated with Menopause*, 125 AM. J. EPIDEMIOLOGY 110, 116-20 (1987); Sonja M. McKinlay & John B. McKinlay, *Aging in a “Healthy” Population*, 23 SOC. SCI. MED. 531 (1986).

289. For example, the National Institutes of Health announced in April 1991 that it would conduct a 10-year, \$500 million nationwide study primarily on the health of postmenopausal women. See Joseph Palca, *NIH: Unveils Plan for Women’s Health Project*, 254 SCIENCE 792 (1991).

290. However, women in high profile positions on television have suffered discrimination when their physical profiles begin to show signs of decline or no longer meet management’s standards. These standards are not always applied equally to men and women and focus on what is pleasing to the public. See, e.g., *Craft v. Metromedia*, 766 F.2d 1205 (8th Cir. 1985).

courts to the United States Supreme Court. Women are practicing physicians, surgeons, and attorneys. Women at the age of menopause serve at the highest levels of government, private industry, and as presidents of coeducational colleges and universities.²⁹¹ Politically active middle age women in this country have run for, and been elected to, almost every political office, and menopause now is the focus of websites, informational organizations and even the theme of a comic strip.²⁹²

IV. POSTSCRIPT

The history that unfolds from the legal stories of middle aged American women is cause for concern and celebration. Once the aged *femme couverte*—a legally incompetent, secondary citizen, valued solely for her anatomy—she is now a dynamic force in public society. Where women were once told they were useless, sick, worn out, or of unsound mind, now they are encouraged to view themselves in a stage of life that has been labeled “P.M.F. or Post Menstrual Freedom.”²⁹³ The shield of silence that surrounded the natural physiological process of menopause and shrouded it in mystery and misinformation has been pierced. In the 1990s, women are talking more openly about menopause and other bodily changes.²⁹⁴

The menopause defense resulted from a confluence of factors: a social climate that embraced menopause as illness; medical professionals eager to create and substantiate the perilous and evil manifestations of hormonal change; essentially unchallenged admission of expert testimony on menopausal syndrome; and unequal application of the eggshell plaintiff doctrine. The defense should have died in 1916 with the failed attempt to use it against Anna Laskowski. The stories of the women (and men) who followed Anna Laskowski reveal the misconstructions and inequalities that can result when negative social and cultural stereotypes supplant neutral decision-making. The stories also show

291. E.g., Madelyn Albright (United States Secretary of State); Barbara Boxer (United States Senator); Judith Rodin (President of the University of Pennsylvania).

292. See, e.g., *Menopause and Beyond* (visited June 14, 1999) <<http://www.oxford.net/~tishy/beyond.html>>; *Menopause Online* (visited June 14, 1999) <<http://www.menopause-online.com>>. See also The North American Menopause Society c/o University Hospitals Department of OB/GYN Cleveland, OH 44106; Susan Dewar, *Us and Them* (Universal Press Syndicate).

293. Carol Travis, *Old Age Is Not What It Used To Be*, N.Y. TIMES, Sept. 27, 1987 § 6, at 24.

294. With the enormous power of pharmaceutical companies to influence views of disease and cure through their advertising budgets and the recent trend to market directly to the consumer, today even men's bodily functions have become a topic for common discussion. For example, the release of the drug Viagra, which enhances penile function, has made this intimate aspect of men's physiology a topic of conversation at office water coolers, and the subject of endless jokes on late night television. See, e.g., *NOVA: The Truth About Impotence* (PBS television broadcast, May 12, 1998), available in <<http://www.pbs.org/wgbh/nova/transcripts/2510impotence.html>>; *Viagra Talk* (visited June 14, 1999) <<http://www.bigv.com>>.

when the intimate circumstances of women's lives become the source of public review and analysis by eager lawyers and acquiescent judges.

Law develops over time in the context of theories and institutions that are controlled by the dominant political group.²⁹⁵ For the greater part of the Twentieth Century women had little role and no power in the American judicial system. As law is a manifestation of the socio/cultural values of dominant political groups, the development, usage, acceptance, and decline of menopause as a legal defense is an example of power and perspective as law. Thus, the menopause defense, like a mirror, reflects prevalent societal attitudes toward women. Similarly, it symbolizes how, with the strike of a gavel, law can give voice to prejudice and stereotype. It took eighty years for the gavel to crack the social mirror that reflected a mad, diseased, and useless menopausal woman.²⁹⁶ It remains for society to erase the image totally.

295. See *BOUNDARIES OF LAW* *supra* note 32, at xiii.

296. "Law can reflect social change, even facilitate it, but can seldom if ever initiate it." *Id.* at xiv.

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
San Antonio Gas Co. v. Singleton 59 S.W. 920	1900	Tex. App.	Plaintiff stated 35	slip & fall	verdict for Plaintiff \$2500	excessive damages & new evidence to support new trial— Affirmed	Appellant alleged Plaintiff was 45, not 35, and that menopause affected her menstruation—not the accident in question
The Little Silver 189 F. 980	1911	Dist. Ct. N.J.	45	boat accident	verdict for Plaintiff \$4000	Federal District Court case—not an appeal	Defendant contended that Plaintiff was undergoing menopause (a change of life) and that pain & suffering were due to that condition, not from injuries received in accident.
Laskowski v. People's Ice Co. 157 N.W. 6	1916	Mich.		horse accident	verdict for Plaintiff \$3500	excessive verdict & court erred in jury instructions Affirmed	doctor testified that Plaintiff's condition was result of menopause—which comes to all women of certain age (which Plaintiff was)—court found no evidence to suggest Plaintiff was not experiencing menopause—but even if she were, the jury instructions safe-guarded Defendant's rights.

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Oliver v. Detroit Taxicab Co. 177 N.W. 235	1920	Mich.	50	car accident	verdict for Plaintiff \$3500	excessive verdict Affirmed	expert testimony was in conflict concerning cause of Plaintiff's condition; defense expert stated "Plaintiff's symptoms were due entirely to <i>the menopause</i> , the change of life"
Armour v. Tomlin 42 S.W.2d 634	1931	Tex. App.		car accident	verdict for Plaintiff \$4987	refusal to submit special question to jury Affirmed	expert testified there was no evidence of injury to Plaintiff's nervous system, and that, in his opinion, Plaintiff was suffering from depression such as is sometimes manifested during <i>the menopause</i>
English v. English 170 A. 864	1934	N.J. Ch.		divorce	evidence established extreme cruelty, entitling husband to divorce	Court of Chancery trial for divorce—not an appeal	wife was movant, husband counterclaimed, alleging extreme cruelty—wife blamed her conduct on mental upset resulting from menopause
In re Grant's Estate 47 P.2d 508	1935	Cal. Dist. Ct. App.	69 (more likely around age 50)	contested will	jury found decedent of unsound mind & denied admission of probate of will	to determine sufficiency of evidence to justify verdict Reversed	contestants (testatrix estate daughters) alleged that she was of unsound mind due to a mental disturbance caused by menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Tate v. Western Union Tel. Co. 96 S.W.2d 365	1936	Mo.	39	electrical accident	judgment for Plaintiff \$17,500 award	excessive award Award reduced to \$12,500	court stated that Plaintiff was at the age the menopause condition sets in and nervousness comes with that condition
Wiley v. Wiley 190 A. 363	1937	Pa. Super. Ct.	49	divorce	divorce granted	to determine whether issues properly decided Affirmed	argumentative wife attempted to defend her conduct saying she was undergoing menopause
Croll v. Miller 2 A.2d 527	1938	Pa. Super. Ct.	50+	Workman's Compensation	judgment awarding total disability	total disability granted in error Reversed	Workman's Compensation referee found menopause a factor in Plaintiff current condition
Fox v. Capital Co. 96 F.2d 684	1938	3d. Cir. Ct. of App.		contempt	Plaintiff in contempt for failing to appear under subpoena	to determine whether failure to appear was wrongful Reversed	doctor testified that Plaintiff shouldn't testify at bankruptcy hearing because "she was suffering from <i>the</i> <i>menopause</i> and was bordering on a complete nervous breakdown"

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Lunt v. Lunt 121 S.W.2d 445	1938	Tex. App.		annulment/ divorce	annulment granted	to determine if husband's perjury warranted reversal of annulment Affirmed	husband had wife jailed and committed to an asylum while she was in menopause by falsely claiming her menopause made her insane, and then obtained annulment in her absence
City of Beaumont v. Wiggins 136 S.W.2d 260	1940	Tex. App.		slip & fall	judgment for Plaintiff \$3500 damages	Defendant objected to jury instruction Reversed and remanded	Defendant alleged that part of Plaintiff's injuries were attributable to menopause
Hollis v. Ouachita Coca-Cola Bottling Co. 195 So.2d 376	1940	La. Ct. App.	45	Black Widow spider in Coca- Cola	judgment for Plaintiff \$600 damages	excessive damages Affirmed	Defendant attributed Plaintiff's symptoms to her menopause
Pearson v. Pearson 41 N.E.2d 725	1941	Ohio Ct. App.	50+	divorce	divorce granted	Plaintiff objected to amount of property awarded Affirmed	court stated it is "common knowledge" that women in menopause are at times "petulant, act irrationally and in an immoderate manner."
Alderman v. Kelly 32 A.2d 66	1943	Conn.		car accident	award to Plaintiff \$6,000 pain & suffering \$1,114 medical	excessive pain & suffering damages Affirmed	Defendant claimed Plaintiff's troubles were due to menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Gray v. Gray 24 S.E.2d 444	1943	Va.	54	divorce	\$50/month alimony	Affirmed	wife defended against adultery charge by claiming that at the time in question, she was going through menopause, was in almost constant pain and hemorrhaging and was too sick to engage in alleged acts
American Employer's Ins. Co. v. Kellum 185 S.W.2d 113	1944	Tex. App.	43	Workman's Compensation	permanent & total disability \$5271	disability finding against weight of evidence Reversed and remanded	Defendant's doctor testified that Plaintiff's condition may reasonably be expected in "women of her age, approaching menopause"
Lee v. Lincoln Cleaning & Dye Works 15 N.W.2d 330	1944	Neb.	41	Workman's Compensation	administrative law judge awarded \$14.67/week for 300 weeks + medical—district court set aside award	award unsupported by evidence contrary to law Reversed district court decision	Defendant claimed Plaintiff was malingering or that her disability was due to menopausal hysteria, not electrical shock received at work
Sisson v. Sisson 36 Haw. 606	1944	Haw.		divorce	divorce granted	sufficiency of evidence to sustain divorce Reversed	wife offered testimony of her menopause to excuse her conduct

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Urffter v. Urffter 35 A.2d 580	1944	Pa. Super. Ct.		divorce	divorce denied	sufficiency of evidence to sustain charges Reversed	wife claimed "menopausal disturbance" to explain bad behavior
Hanson v. City Light & Traction Co. 178 S.W.2d 804	1944	Mo. Ct. App.	47	negligent installation of gas pipes	judgment for Plaintiff \$1750	erroneous admission of evidence Affirmed	doctors testified that Plaintiff's symptoms were subjective—due to menopause—Plaintiff claimed menopause occurred two years prior
Olin Indus., Inc. v. Industrial Comm'n 68 N.E.2d 259	1946	Ill.		Workman's Compensation	judgment for Plaintiff	judgment against weight of evidence Affirmed	company doctor testified that Plaintiff's condition was due to menopause but that he believed she was sincere and might be a traumatic neurotic
Richey v. Service Dry Cleaners 28 So. 2d 284	1946	La. Ct. App.		car accident	judgment for Plaintiff \$850	insufficient award Affirmed Damages increased to \$1500	Defendant argued that almost all medical treatment sought by Plaintiff was unnecessary or induced by nervousness caused by menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Whiney v. Whiney 58 A.2d 183	1948	Pa. Super. Ct.	36	divorce	divorce granted	Affirmed	wife charged with behavior that made husband's life intolerable attempted to attribute her actions to a nervous ailment caused by menopause, but she offered no proof that she was in menopause
Schwarz v. Loew's Theatre & Realty Corp. 77 N.Y.S.2d 95	1948	N.Y.S.C. App. Div.		struck by car	verdict for Plaintiff \$15,000 court reduced to \$8500	excessive award Affirmed	dissent said the finding that Plaintiff's emotional problems and nervousness were caused by accident was against the weight of evidence because Plaintiff was suffering from menopausal disturbances
Glass v. Glass 63 A.2d 696	1949	Pa. Super. Ct.	43	divorce	divorce granted	lack of clear and satisfactory proof Reversed	court held that, although wife abused husband, divorce could not be granted because she was in menopause and had mental illness and therefore could not form the requisite intent

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Day v. Rains 220 S.W.2d 575	1949	Ky. Ct. App.	50	razor in Pepsi	judgment for Plaintiff \$2000	excessive award Affirmed	treating physician was questioned at length about possibility that Plaintiff's menopause caused or contributed to her condition.
Airline Motor Coaches v. Green 217 S.W.2d 70	1949	Tex. App.	47	bus accident	verdict for Plaintiff \$10,000	excessive verdict Affirmed	doctors testifying for Defendant said Plaintiff was suffering with menopause not head injury caused by accident
Mayor of Beverly v. First Dist. Court of Essex 97 N.E.2d 181	1951	Mass.		wrongful discharge	reinstated discharged police officer	Mayor's finding of wrongful conduct & discharge upheld	police officer accused of rape attempted to discredit victim by claiming she was suffering from hysteria due to menopause
Four Branches, Inc. v. Oechsner 73 So. 2d 222	1954	Fla.		Workman's Compensation elevator accident	Industrial Commission dismissed Plaintiff's claim	Commission findings were contrary to preponderance of evidence Affirmed	court said it was undisputed that at time of alleged accident Plaintiff was and had been <i>in the throes of menopause</i>

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Laurel Coca Cola Bottling Co. v. Hankins 75 So. 2d 731	1954	Mo.		poisoned Coca-Cola	verdict of Plaintiff \$12,000	excessive verdict Affirmed	Defendant alleged Plaintiff was passing through menopause when she drank the cola, that the menopause, not the cola, caused her nausea and that menopause caused her to exaggerate her injury
Brown v. Payne 264 S.W.2d 341	1954	Mo.	41	Workman's Compensation	verdict for Plaintiff \$10,000	excessive verdict Award reduced to \$7,000	Defendant claimed Plaintiff's chronic pain in head and arms, lack of appetite, nervousness, and irritability were caused by menopause, not by the accident
Stewart Co. v. Christmas 79 So. 2d 526	1955	Miss.		Workman's Compensation	Workman's Compensation Commission found Plaintiff qualified as dependent widow	Affirmed	Plaintiff and husband had not had sexual relationship for several years before his death because Plaintiff was passing through menopause; Defendant claimed lack of sexual relationship disqualified Plaintiff from status of wife or widow

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Yellow Cab & Baggage Co. v. Green 277 S.W.2d 92	1955	Tex.		cab accident	judgment for Plaintiff	inappropriate jury instructions Affirmed	prior infirmities, not accident, were cause of damages
Maroun v. New Orleans Public Serv., Inc. 83 So. 2d 397	1955	La. Ct. App.	54	bus accident	judgment for Plaintiff \$1000	insufficient award Affirmed	Plaintiff claimed accident aggravated pre-existing conditions and caused personality change; court said reasonable medical explanation for personality change and innumerable aches and pains was menopause
Hirsh v. Manley 300 P.2d 588	1956	Ariz.	52	car accident	judgment for Plaintiff \$11,250	excessive damages Remanded for new trial on issue of damages only	Defendant wanted jury instruction that no damages should be awarded to Plaintiff because of preexisting conditions of "obesity, menopause and/or poor posture,"—denied due to lack of evidence
Pfautz v. Sterling Ins. Co. 135 A.2d 806	1957	Pa. Super. Ct.		insurance disability	judgment for Plaintiff	Affirmed	insurer attempted to avoid paying claim because Plaintiff had not reported treatment for menopause on application for insurance policy

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Vogrin v. Forum Cafeterias of Am., Inc. 308 S.W.2d 617	1957	Mo.		slip & fall	verdict for Plaintiff \$1000 J.N.O.V. for Defendant	insufficiency of damage award Affirmed	Defendant's doctor said: there is a strong psychogenic overlay—Plaintiff is having menopausal symptoms which aggravate and prolong her symptoms
King v. King 152 So. 2d 889	1963	Miss.	53	suit for separate maintenance	\$80/month maintenance to wife	Reversed, No Maintenance	trial court observed that wife had not been in good health due to menopause
Cimijotti v. Cimijotti 121 N.W.2d 537	1963	Iowa	52	divorce	divorce granted	division of prop. inequity Affirmed divorce; Modified property division	husband tried to show wife's physical and emotional condition was due to menopause, not his cruel treatment of her
Worthen v. Worthen 374 S.W.2d 935	1964	Tex. App.	60+	divorce	divorce denied	Reversed	wife allege cruel and inhumane treatment—husband asserted that ever since wife went through menopause 20 years ago she was withdrawn and erratic

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Johnson v. Gulfport Laundry 162 So. 2d 859	1964	Miss.	44	Workman's Compensation	no damages	lack of substantial evidence to reverse order of attorney referee that awarded disability damages Affirmed	doctor testified that job was not the cause of Plaintiff's illness, rather she had an involutional depressive reaction as a result of menopause
Beyer v. City of Dubuque 139 N.W.2d 428	1966	Iowa	70	slip & fall	judgment for Plaintiff \$25,000	verdict unsupported by evidence Affirmed	Defendant's expert testified that Plaintiff's back trouble was result of post- menopausal osteoporosis; Plaintiff's expert testified that she had undergone menopause 20 years earlier: osteoporosis would have developed earlier if caused by menopause
<i>In re</i> St. John 272 N.Y.S.2d 817	1966	N.Y. Fam. Ct.	48	custody		habeas corpus proceeding to determine custody of child in foster care; Custody awarded to Department of Welfare	foster parents' request to adopt was rejected because Department of Welfare believed adoption of young child would be too stressful for menopausal foster mother

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Reid v. Florida Real Estate Comm'n 181 So. 2d 846	1966	Fla. Dist. App.	49	Real Estate license revocation	license suspended	whether examiner's conclusions of law were correct Reversed	examiner concluded as a matter of law that Plaintiff's menopause and resulting "anxiety syndrome" rendered her unable to form the requisite intent with respect to alleged larceny.
Fielder v. Production Credit Ass'n 429 S.W.2d 307	1968	Mo. Ct. App.	65	Workman's Compensation	award to Plaintiff of \$818 plus \$16/week for 300 weeks + \$18/week for life	was award contrary to weight of evidence Affirmed	doctor stated Plaintiff had menopausal osteoporosis that predated the accident and that this was cause of disability
Danner v. Danner 206 So. 2d 650	1968	Fla. Dist. Ct. App.		divorce	Plaintiff wife's complaint reinstated	interlocutory appeal Affirmed	husband stated wife's alleged grievances and complaints were due to menopause
Merritt v. Hemstead 206 So. 2d 718	1968	La. Ct. App.		car accident	verdict for Plaintiff \$9000	excessive award Affirmed	Plaintiff doctors said menopause can cause anxiety & depression but it was not a factor here
Montgomery v. Manos 440 P.2d 629	1968	Kan.		car accident	judgment for Defendant on injuries	verdict contrary to evidence Affirmed	Plaintiff had history of menopausal and emotional complaints prior to accident

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Hicks v. Deer 222 So. 2d 88	1969	La. Ct. App.		custody	custody given to mother	whether trial court's decision was in best interest of child Affirmed	Defendant's mother testified she over reacted to statements made by Defendant because she was going through menopause
Walker v. State Personnel Bd. 94 Cal Rptr 132	1971	Cal. Ct. App.		employment	doctor dismissed; trial court reversed	Reversed	resident doctor was disciplined for focusing on patients menopause rather than on underlying emotional problems
Maryland Cas. Co. v. Davis 464 S.W.2d 433	1971	Tex. App.	42	Workmen's Compensation	judgment for Plaintiff	Affirmed	doctor testified menopause did not cause conjunctivitis—injury did
Devillier v. Trader's & Gen. Ins. Co. 321 So. 2d 55	1975	La. Ct. App.		car accident	judgment for Plaintiff \$1000	inadequate award Affirmed	court found that at time of the accident Plaintiff was going through menopause causing her to be nervous and requiring medical treatment
Leasman v. Beech Aircraft Corp. 121 Cal. Rptr. 768	1975	Cal. Ct. App.		bad plane landing	summary judgment for Defendant	Affirmed	doctor attributed Plaintiff's emotional problems to marital problems, menopause, and alcohol consumption

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Braun v. Ford Motor Co. 363 A.2d 562	1976	Md. Ct. Spec. App.		product liability —automobile	verdict for Defendant	improper jury conduct Affirmed	jurors had access to newspaper article on menopause; Plaintiff argued that similarity between her injuries and menopause symptoms described in article impaired the credibility of her evidence
McCommon v. Hennings 283 N.W.2d 166	1979	N.D.		car accident	jury found Defendant responsible for accident, but awarded no damages	lack of damage award was against the evidence at trial Affirmed	evidence showed Plaintiff could have been suffering from menopausal melancholia causing headaches, fatigue, irritability, and tension
Shilling v. State Accident Ins. Fund 610 P.2d 845	1980	Or. Ct. App.	54	Workman's Compensation	judgment for Plaintiff	whether Plaintiff's illness was caused by job Affirmed	Defendant claimed Plaintiff's emotional distress caused by concerns about menopause, obesity, bronchitis, and her father's health problems, not overwork
Hayes v. Commercial Union Assurance Co. 459 So. 2d 1245	1984	La. Ct. App.	46	car accident	judgment for Plaintiff \$20,000	excessive award Affirmed	doctor said depression from accident not menopause

Case name	Year	Jurisdiction	Woman's Age	Type of Case	Trial Court Result & Damages	Reason for Appeal & Result	Comments
Keene v. Cracker Barrel Old Country Store, Inc. No. 01-A-01- 9505-CV002211, 1995 WL 623070	Oct. 25, 1995	Tenn. Ct. App.		slip & fall	partial summary judgment for Defendant	whether genuine issue of material fact existed Reversed and Remanded	Defendant argued that injury common in post- menopausal women and Plaintiff was post- menopausal

REVIEW ESSAY

ORTHODOXY AND HERESY: THE NINETEENTH CENTURY HISTORY OF THE RULE OF LAW RECONSIDERED

RICHARD P. COLE*

Review of David Ray Papke,** *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH*, New York University Press, New York (1998).

INTRODUCTION: NEW PERSPECTIVES UPON THE RULE OF LAW

The dominant genre of American legal history informs lawyers about how the legal system evolved to its present form. It is an internalized history of influential lawmaking that shaped American legal culture.¹ It includes a large body of scholarship, much of it within the past generation, recounting the rise of a legalistic and powerful rule of law in Nineteenth Century America.² Although the existing history is most valuable, we are fortunate that David Papke has devoted his considerable intellectual talents to produce a book, *Heretics in the*

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1. See Daniel Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 428-33 (1941); Robert Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC'Y REV. 9, 17 (1975-1976).

2. General works that address this history include: LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2nd ed., 1985); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (1989); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) [hereinafter *CRISIS OF LEGAL ORTHODOXY*]; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) [hereinafter *TRANSFORMATION*]; WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE IN MASSACHUSETTS, 1760-1830* (1975). Some of this history is critical, notably Horwitz'.

Temple: Americans Who Reject The Nation's Legal Faith, that provides scholars with new perspectives upon the history of the rule of law in America. All of Papke's perspectives are consistent with the broad approach to the study of American legal culture that is characteristic of his scholarship.³ While none of Papke's perspectives is entirely without precedent, all have been given far too little attention in histories of American Law.

Although most legal history tells of the Creons who built and defended the rule of law, Papke's protagonists are the Antigones who attacked it. Papke's heretics include: the abolitionist William Lloyd Garrison; the feminist Elizabeth Cady Stanton; the labor advocate and Socialist leader Eugene Debs; the three major leaders of the Black Panthers, Huey Newton, Bobby Seale, and Eldridge Cleaver; and finally, contemporary militia and anti-abortionist activists. Papke has chosen to study heretics who were activists rather than original thinkers.⁴ For example, he did not include academics, like the Realists or their successors, the Law and Society and Critical Legal Studies movements, who have attacked the rule of law as illusory.

In writing *Heretics* Papke has cast the door of internal legal history ajar, allowing its readers to peek outside and see some of the popular protest against the rule of law during the past century and a half. All of Papke's heretics, save for William Lloyd Garrison, advocated for an alternative that their contemporaries rejected, and that to this day in some cases has not been accepted. Papke's book, then, breaks out of the confines of Whig history.⁵ Still, one finishes his book with the impression that America has had a few heroic Antigones who fought a lonely struggle against a dominant culture that unreservedly celebrated the rule of law. Part I reviews a conventional version, relied upon by Papke in chapter one of *Heretics*, of the rise of the rule of law in America that supports this view.

In contrast to this version of the history of the rule of law, Part II of the Essay argues that if historians push open the door of internal legal history wider they will find not just a few heretics, but a chorus of diverse voices that during the Nineteenth Century critiqued the rule of law. Consistent with the democratic tone of their antilegalism, some critics proffered an alternative of popular justice to it. This tradition of antilegalism suggests another point. Although Papke's litmus test for a heretic is objective—to identify those who lost faith in the rule of law—this Essay suggests the more subjective approach of defining legal heresy within a specific historical context.

Because there was more popular resistance during the Nineteenth Century to

3. Papke is a leading figure in the law and literature, and broader law and culture movements.

4. There are exceptions to this general statement. They include Elizabeth Cady Stanton's application of principles of the Declaration of Independence to support the claims of feminists, and the concept of a "lumpen proletariat" borrowed from Karl Marx in the ideology of the Black Panthers. See DAVID RAY PAPKE, *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH* 59-61, 117-18 (1998).

5. See generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1951).

the rule of law than conventional history suggests, Part III of this Essay reconsiders how the rule of law became the bedrock of modern American legal culture. In this reassessment Papke again offers a valuable perspective to scholars. Legal historians from both the political right and the left, consistent with the dominant form of legal history, have usually focused their attention upon the efforts of America's legal elite consciously to fashion a rule of law. In striking contrast, *Heretics* reflects a perspective upon American culture that Papke gained as a Fulbright Scholar in Asia, as well as his abiding interest in popular legal culture. For Papke, a foundational feature of the history of the rule of law is that Americans became infused with a legal faith in it, seemingly unique among the nations of the world.⁶ Indeed it is this legal faith that explains why the rule of law became so powerful in Nineteenth Century America. Papke intends his studies of isolated heretics to illuminate the depth of America's legal faith. In reassessing the rise of the rule of law, Part III of this Essay begins with a review of the legal ideology articulated by the new nation's legal elite. But there were important divergences between it and the popular legal ideology of the free market. This suggests that factors external to the legal profession were important to the development of the popular legal faith during the Nineteenth Century. Part III explores what these might have been.

Part IV concludes the Essay by arguing that the greatest value of Papke's book is to urge scholars, employing the new perspectives suggested by him, to engage in further study of the history of the rule of law. In addition to an externalist view of law and concern for law's impact on popular culture, Papke offers yet another valuable perspective to scholars who choose to study the rule of law in American culture. Fitting for a book concerned with legal heresy, Papke suggests intersections of law and religion in American history. They are more than just shared trappings like jargon and ritual, whatever their importance.⁷ For example, both law and religion have bodies of doctrine that developed through a process of interpretation. Of particular significance for study of the rule of law, religion and law are both systems of authority. Given the similar territory they occupy, it is hardly surprising that for a very long time religion and law vied in American culture as the source of its values and arbiter of its conflicts. During the Nineteenth Century, law prevailed and displaced religion as the central institution of what became defined as the public sphere of life, although a wide spectrum of Americans ultimately perceived a synthesis of law and religion at least in constitutional law. Heretics were often at the cutting edge of this struggle, therefore it is not surprising that the legal heresies of a number of them, notably of William Lloyd Garrison and Eugene Debs, and of course, anti-abortionists, were spawned by religious ideals.⁸ In focusing upon interactions of law and religion, Papke departs from the dominant tradition of American legal history, which isolates law from cultural contexts. Papke's

6. "The legal faith is one feature of Americanism that distinguishes it on the world stage."

PAPKE, *supra* note 4, at 23.

7. Papke stresses the ritualistic nature of the courtroom trial. *Id.* at 8-12.

8. *See id.* at 39-41, 93-94.

approach is also welcome because one of the greatest weaknesses not only of American legal history, but of much of American history generally, is a failure to recognize the enormous significance of religion in the American experience.

Though challenging to scholars interested in the history of the rule of law, *Heretics* is a most readable book readily accessible to anyone interested in the history of American law. Both its prose (in Papke's characteristically concise style and conversational tone) and its organization have clear, simple lines. Papke also made several important choices in writing about his subject that enhance the book's readability. Though the heresy of each of his subjects was nurtured by membership in a group,⁹ he focuses upon the lives of individual heretics. In general, *Heretics* is historical rather than analytic in its approach, an act of restraint that keeps it from becoming ponderous. *Heretics*, then, constitutes a winning combination: It provides readers with new perspectives upon a most important subject in an arresting form.

I. ONE (OVERLY WHIGGISH) VERSION OF THE RISE OF THE RULE OF LAW

In an important passage demonstrating his ability to condense large ideas into a concise form, Papke summarizes the characteristics of the Nineteenth Century rule of law:

Americans believed that laws were to be made in public, without bias for particular individuals or classes and with an honest commitment to the public good. Lawmakers were to expressly promulgate the laws in clear, general, non-retroactive and non-contradictory form. The laws were to be feasible and predictable, and people were for the most part to know them or at least be able to find them out. Officials applying the law, especially judges, were to be fair and impartial, treating similar cases in similar ways, extending due process, free from public pressure, to one and all. An alternative popular will theory never seriously contested with this variety of legalism.¹⁰

Papke insightfully associates the rise of the rule of law with a process of "modernization" of American life whose roots extended back into Eighteenth Century colonial history.¹¹ During this period there occurred a general anglicanization of American life. Commerce began to quicken as more Americans became enmeshed in market transactions. In some colonies there occurred an enormous increase in debt claims litigated in local courts. Rising commercial activity provided business for a legal profession that began to emerge. Talented young men like John Adams increasingly chose to make law their profession.¹² The law they practiced was highly anglacized, as English

9. See *id.* at 38.

10. *Id.* at 13.

11. *Id.* at 1-2.

12. See Stephen Botein, *The Legal Profession in Colonial North America*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 129, 133, 138-39 (Wilfred Prest ed., 1981); see also John

common law and its attendant legal institutions became commonplace throughout the American colonies.

Reflecting the rising importance of law and the legal profession, by the time of the revolutionary period America had a new cultural paradigm, a configuration of law and letters. It was neoclassical in its sources and style. Many of the founders, including Adams and Thomas Jefferson, were highly educated lawyers who disdained the unlearned pettifogger and practiced the neoclassical style. The new culture was so powerful that William Blackstone's *Commentaries on the Laws of England*,¹³ published during the last half of the 1760s, "rank[ed] second only to the *Bible* as a literary and intellectual influence on the history of American institutions."¹⁴ This is one reason why the great documents of the revolution, even the Declaration of Independence, despite Jefferson's resort to natural law in its opening clause, were legalistic. In 1787 the Federal Constitution replaced the Articles of Confederation with a stronger national government, including a federal judiciary. By their successful revolution Americans had replaced royal prerogative with a rule of law. As Thomas Paine observed: "[I]n America the law is king."¹⁵

According to Papke, the adoption of a legalistic rule of law in the new nation occurred with remarkable celerity. During the Revolution, American patriots viewed law as a corrupt British institution. But, in an amazing turnabout, by the 1820s both the common law and the legal profession had attained a status in the new nation that was without precedent in American history.¹⁶ Defenders of the common law successfully parried recurrent efforts to codify American law that cropped up throughout the period between the Revolution and the Civil War, and that were particularly sustained during the generation from 1820 to 1850.¹⁷ As Americans moved westward they typically destroyed the law and legal institutions of established Native American and European communities and replaced them with a familiar common law.¹⁸

M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in STANLEY NIDER KATZ, *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 415 (1971).

13. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* (Wm. Hardcastle Browne ed., 1892).

14. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984). *See also id.* at 30-32. Ferguson observes: "Not since Justinian's *Institutes* in the [S]ixth [C]entury had there been within western civilization such a successful attempt to reduce to short and rational form the complex legal institutions of an entire society." *Id.* at 31.

15. PAPKE, *supra* note 4, at 1.

16. *See* TRANSFORMATION, *supra* note 2, ch. 1; PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 109 (1965).

17. *See* CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* chs. 4-8 (1981).

18. The Louisiana civil code was an exception. *See* MORRIS S. ARNOLD, *UNEQUAL LAWS UNTO A SAVAGE RACE: LAW IN AMERICA, 1686-1826* at xviii (1985); GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (1975); Richard P. Cole, *Law and*

The legal elite who defended the common law legal order reworked it into a more strictly legalistic form. A major indication of the law's increasing legalism was the dramatic decline of the lawmaking powers of juries in civil litigation by the early Nineteenth Century.¹⁹ The legal elite also created an indigenous American body of written law and legal literature. For the first time each state began to publish the opinions of its highest court. Leading judges like James Kent and Joseph Story published many important treatises on law that became the centerpieces of the new American legal literature. Kent and Story also taught law in colleges to young men aspiring to the law as professional legal education began to challenge the apprenticeship as the method of preparation for law practice.²⁰

America's legal elite also promoted the influence of the new body of constitutional law, adopted by Americans as the basis of their federal and state governments, as another foundation stone of America's rule of law.²¹ Critical to emergence of the Federal Constitution as a preeminent symbol as well as an instrument in American culture was the adoption of judicial review of legislation to ensure that it was in accordance with principles of constitutional law.²² This practice did not have deep historical roots in English legal culture, but by 1803, with John Marshall's decision in *Marbury v. Madison*,²³ the doctrine of judicial review became a fixture of American jurisprudence.

The Federal Constitution soon became the central icon of a legal faith that almost mystically formed around it. The majestic trial advocacy of giants like Daniel Webster, as well as Fourth of July speeches, enshrined it. By the 1820s a new literature venerating the Constitution, including public school readers inculcating its virtues to the nation's children, began to appear.²⁴ Americans used powerful metaphors to describe the role of the Constitution in American culture. In his first inaugural, Jefferson described it as the "anchor" to the American

Community in the New Nation: Three Visions for Michigan, 1788-1831, 4 S. CAL. INTERDISC. L.J. 161, 172 (1996) [hereinafter *Law and Community*].

19. See NELSON, *supra* note 2, at 165-72.

20. By 1800, the famous Litchfield Law School was educating lawyers, and William and Mary, the University of Pennsylvania, Columbia College, and Transylvania University offered courses in law. Between 1760 and 1840 about 70% of practicing lawyers in Massachusetts had a college education. See GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840*, at 135-41 (1979); see also John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993).

21. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 259-67 (1969).

22. See Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1078 (1936). The French commentator upon American society, Alexis de Tocqueville, surely had the practice of judicial review in mind when he observed that Americans had given their Supreme Court "higher standing than any known tribunal." MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 48 (1986).

23. 5 U.S. (1 Cranch) 137 (1803).

24. See PAPKE, *supra* note 4, at 4-8.

system of government. Others described it as the "ship of state," or as a Newtonian machine so wonderful that it would run by itself.²⁵ Some cartoons suggested that it was the basis of American union, prosperity, justice and peace.²⁶ No one claimed more for it than did Abraham Lincoln. According to him it was "[a] reverence for the Constitution and laws" that kept American democracy from a decline into the mobbish anarchy feared by classical political theory.²⁷

These developments lead both Papke and Robert Ferguson to conclude that law attained cultural ascendancy in the earliest period of the new nation. Law became its "official discourse."²⁸ The doctrine of judicial review was critical to "the lawyer's hegemony as republican spokesman official."²⁹ Borrowing a concept from Clifford Geertz, the grand courtroom advocacy characteristic of America's first generation of lawyers became "the active center[] of social order."³⁰ Summarizing the triumph of the rule of law in Nineteenth Century America, Papke quoted a notable passage from an address delivered by David Dudley Field at the University of Chicago Law School:

"Though [law] may be the most familiar of all things, it is also the most profound and immense. It surrounds us everywhere like the light of the autumnal day, or the breath of this all-comprehending air. It sits with us, sleeps beside us, walks with us abroad, studies with the inventor, writes with the scholar, and marches by the side of every branch of industry and every new mode of travel. The infant of an hour old, the old man of three-score and ten, the feeble woman, the strong and hardy youth, are all under its equal care, and by it alike protected and restrained."³¹

The cultural ascendancy of law constituted a triumph of law over nature, of head over heart. Neoclassical form reigned in both romantic imagination and evangelical enthusiasm. A number of the new nation's young men talented in literature continued to practice law. Those who did break away from practice, at least for a time, suffered a severe vocational crisis that constrained them from writing literature for its own sake.³² Legalistic values were also foundational to

25. See KAMMEN, *supra* note 22, at 17-18.

26. See Alan Ira Gordon, *The Myth of the Constitution: 19th Century Constitutional Iconography*, in *LAWS OF OUR FATHERS: POPULAR CULTURE AND THE U.S. CONSTITUTION* 89, 89-93 (Ray B. Browne & Glenn J. Browne eds., 1986).

27. PAPKE, *supra* note 4, at 15.

28. *Id.* at 13.

29. FERGUSON, *supra* note 14, at 20.

30. *Id.* at 23 (quoting Clifford Gertz, *Centers, Kings, and Charisma: Reflections on the Symbolics of Powers*, in *CULTURE AND ITS CREATORS: ESSAYS IN HONOR OF EDWARD SHILS* 150 (Joseph Ben-David & Terry Nichols Clark eds., 1977)).

31. PAPKE, *supra* note 4, at 14 (quoting David Dudley Field, *Magnitude and Importance of Legal Science*, in *STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 712-17 (2d ed. 1989)) (alteration in original).

32. See FERGUSON, *supra* note 14, at 91; MILLER, *supra* note 16, Part II. John Adams considered writers to be "learned Idler[s]." FERGUSON, *supra* note 14, at 91. Blackstone again

the literature of some of the lawyer turned writers, notably that of William Cullen Bryant.³³ Another result of the post-revolutionary triumph of a rational legalism was that lawmaking became separated from the moral values of the community. Law seemed to be replacing religion as the primary source of authority in Nineteenth Century America.³⁴

Some renditions of the rise of the rule of law in America suggest that it weakened by the middle of the Nineteenth Century.³⁵ The influence of the Enlightenment in America had dissipated by the end of the first quarter of the century and the neoclassical culture of law and letters would soon collapse. Legal education and standards for admission to the bar declined during the Jacksonian period. Further, the incendiary slavery controversy, ultimately leading to the cataclysm of the Civil War, represented a resort to force over law. Papke rejects this nuance to the history of the rule of law. Instead, he argues that the rule of law, bolstered by the emergence of a formalistic jurisprudence, emerged from the Civil War and into the late Nineteenth Century more powerful than it had been during the antebellum period.³⁶ I agree. Indeed, it was only after the Civil War that the rule of law seems to have achieved widespread acceptance in Nineteenth Century popular culture.

This account, or variants of it, constitutes the dominant version of the rise of rule of law in America. It is in many respects insightful. But in the Whig tradition of writing history, it is another story of a progressive march to modernity, and it retells this story from the perspective of America's legal elite. This version of the history of the rise of the rule of law is so powerful an orthodoxy that it has left its mark even upon a study of America's legal heretics. But if we adopt Papke's perspective that focuses our attention upon popular culture, we can discern many examples of resistance to the emerging legalistic rule of law in America during the period from the Revolution to the Civil War. Those who resisted the rule of law frequently favored an alternative law based upon a simple, popular and natural justice.

became the model, for he abandoned writing poetry for writing about the law. *Id.* at 92.

33. Despite the celebration of nature in some of his best works, Bryant always rejected its allure for civilization, order, the public good, and work. Even at the level of art he preferred aesthetic unity over the confused natural world, the rational perception over emotion and an unrestrained surrender to the heart. See FERGUSON, *supra* note 14, ch. 7.

34. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 80-81 (1975); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* ch. 1 (1985); Alfred Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988) (book review). Konefsky uses two pictures from 1805 and 1850 to demonstrate the displacement of religion by law as a source of authority, one imaginative and one real, for Boston's social elite. Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court, was at the center of the picture in 1850. *Id.* at 1156.

35. One example of this view is found in FERGUSON, *supra* note 14, ch. 10.

36. PAPKE, *supra* note 4, at 19.

II. POPULAR RESISTANCE TO THE RULE OF LAW

A. *The Pre-Nineteenth Century Tradition of Anglo-American Antilegalism*

Seventeenth Century English immigrants did not arrive in America imbued with a deep faith in a strict rule of law. To the contrary, they came from a country that had a long tradition of antilegalist sentiment, which became stronger during the Seventeenth Century. Over many centuries, of course, antilegalists expressed diverse, sometimes inharmonious, views. But as Robert Gordon recognized, there were also important continuities in the Anglo-American tradition of antilegalism.³⁷ While marking out the exact parameters of antilegalism is difficult, it typically embodied an attack upon professional lawyers and judges, upon a complex and uneconomical system of litigation, and upon lawmaking based upon the internal logic of the law itself, separated from popular moral values. Antilegalists often proffered an alternative of a popular justice dispensed in simple and economical forms by lay persons of the community, and based upon the moral values of that community.³⁸ Antilegalism, then, represented a protest against elitism and, especially in Nineteenth Century America, against the centralization of lawmaking authority. It often reflected the view that the culture had become too secular and worldly. Gordon makes the important point that in its most radical form Anglo-American antilegalism represented a fundamental challenge not only to the existing legal order, but to the wealth, power, and hierarchy of the general social order.³⁹

Anti-lawyer sentiment is almost as old as the emergence of the legal profession itself in English history. The new profession became the object of many criticisms, including that it contributed to the complex technicalities that made law foreign and confusing to ordinary people. The mysteriousness of law, malleable to a seemingly infinite variety of interpretations, enabled lawyers to use it to prey upon the people for the benefit of the rich and powerful.⁴⁰ This critique of the legal profession was often linked to a utopian vision of justice

37. Robert W. Gordon, *American Codification Movement: A Study of Antebellum Legal Reform* (1981), 36 VAND. L. REV. 431, Part V (1983) (book review).

38. Because antilegalists emphasized the linkages of law and morality, the few references to natural law in Part II may surprise readers. One reason for this is the limits of this Essay. But more importantly, contemporary jurisprudential discussions make clear that natural law is a protean concept. Historically it has been used both as the basis to support a rule of law and, as some of the material of this Part will show, to critique it.

39. Gordon, *supra* note 37, at 452-53.

40. In early English literature, for example, law was "[w]here Judges and Juries may see, as in a glass." E.W. Ives, *The Reputation of the Common Law Lawyers in English Society, 1450-1550*, 7 U. BIRMINGHAM HIST. J. 130, 131 (1959). The lawyer was able to "[p]rove right wrong, and all by reason, And make men lose both house and land." *Id.* at 134. One writer characterized lawyers as "insatiable cannibals," and felt it would only be justice to turn the Inns of Court into hospitals for the poor. *Id.* at 141.

without lawyers.⁴¹

The conflict between Parliament and the Crown that led to the English Civil War and Oliver Cromwell's Protectorate during the middle decades of the Seventeenth Century provided a unique opportunity for ordinary citizens to vent antilegalist views.⁴² A variety of groups critiqued the English common law and lawyers during this period, the most representative of popular protestors being the Levellers, and secondarily, the Diggers. The Levellers had middle class origins, and their views became influential in Cromwell's army. The Diggers were dispossessed agrarians. In general the Levellers were more moderate in their attacks upon the common law than were the Diggers, who articulated a deep protest against the law, and of the existing political, social and economic order.⁴³

Antilegalism of this period often began with a golden age of popular justice in Anglo-Saxon England. But the Norman conquest had destroyed this simple justice and replaced it with a professional and centralized legal order that was needlessly laden with foreign legalese, complex forms, delay and expense. English law came to exalt form over spirit, best exemplified by a slavish adherence to old and now irrelevant precedents. Instead of being rooted in popular community, law became a vehicle for the rich to oppress the poor.⁴⁴ In popular literature the central figure of this unjust legal system, the lawyer, became associated with the "Court," and a resolute foe of the "Country" opposition.⁴⁵

Antilegalists of this period typically advocated some form of popular justice

41. After describing the "infinite . . . number of blind and intricate laws" of English society, Thomas More envisioned that "in Utopia every man is a cunning lawyer. For they have very few laws: and the plainer and grosser that any interpretation is, that they allow as most just." Hugh Latimer foresaw that at the day of judgment that men "shall not need any men of law, to go about to defend or discern their causes" for then they would be judged "for their own hearts and consciences." *Id.* at 135.

42. People used petitions, pamphlets, and public meetings to express their views, forms of expression that in the Seventeenth Century were "quite new and unprecedented." Further, those expressing their views were "the hobnails, clouted shoes, the private soldiers, the leather and wollen aprons and the laborous and industrious people . . . the oppressed friends, the commoners of England, the inferior tenants and pour labourers." DONALD VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM* at ix (1970).

43. The views of the more radical Levellers, however, like William Walwyn, shaded into those held by the Diggers. *See id.* at 98-100, 106-09. Levellers were "skilled craftsmen, tradesmen, shopkeepers, lesser merchants, common soldiers, self-employed miners, and later, small peasant proprietors." *Id.* at 100.

44. Two important pamphlets of the period expressed this view. Writing in 1649, John Warr observed that, "The web of law entangles the small flies and dismisseth the great." A decade later William Cole expressed a greater fear of being stolen from by the power of the law than by those who would endeavor to take his purse on the highway. *See id.* at 102-03.

45. *See id.* at 200-06; *see also* A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810* ch. 1 (1981) (concerning the perception of lawyers as associated with the court).

alternative. They called for either the abolition of the legal profession, or its strict regulation. They also wanted decentralized tribunals resolving cases according to published legal rules understandable to lay persons. The Levellers were ardent supporters of trial by jury, a view not shared by dispossessed Diggers because to be a juror one had to be a freeholder. Some advocated for a general framework of law embodied in codes. Whatever its form, lawmaking was to be in accordance with the values of the community.

Some of the antilegalism of the period was truly radical. For example, the advocacy for natural justice of a leading pamphleteer of the period, John Warr, was linked to a vision of the liberated citizen of an egalitarian social order. He proposed

to free the clear understanding from the bondage of Form and to raise it up to Equity, which is the substance itself. . . . [T]he principled man hath his freedom within himself, and walking in the light of Equity and Reason (truly so called) knows no bounds but his own, even Equity.⁴⁶

Though the radical antilegalism of Warr was not evident in England's Seventeenth Century American colonies, elements of antilegalism could be found throughout them. This was so even in southern colonies originally settled by supporters of the King. Both the charters that the colonies received from the Crown, as well as the recent decision in *Calvin's Case*,⁴⁷ called for adherence to English law by the colonists. In Virginia a small legal profession soon developed. Still, there were trappings of antilegalism in early Virginia. Much of its law was based upon community moral values.⁴⁸ Further, anti-lawyer sentiment soon surfaced, much of it fanned by an indigenous elite that emerged during that century. Because Virginia lay at the periphery of the English empire, its elite identified with the Country Party and viewed lawyers as competitors for patronage. Further, the legal style of the two groups differed. When members of Virginia's elite, most of whom were not legally trained, acted as magistrates, they resolved cases brought before them with a patriarchal discretion instead of by strict adherence to precedents cited by lawyers. For example, debt cases filed in their courts were typically settled with each party "receiving his due."⁴⁹

46. Gordon, *supra* note 37, at 453 (quoting JOHN WARR, ADMINISTRATIONS CIVIL AND SPIRITUAL 6-10 (1648), *quoted in* CHRISTOPHER HITT, THE WORLD TURNED UPSIDE DOWN 230 (1972)). Gordon is citing from the work of Christopher Hill, who states that Warr equated "Equity" with "natural justice," not the lawmaking of the Court of Chancery. *Id.* at n.103. Gordon also points out that when Warr criticized "form" he was attacking "not only strict technical rules and intricate, rigid procedures, but also the deferential ceremonies and ritual trappings of documents, seals, costumes, special languages and the like." *Id.* at n.104. For Warr, law "was . . . a kind of idoltry." *Id.* at 452-53. See generally VEALL, *supra* note 42; Barbara Shapiro, *Law Reform in Seventeenth Century England*, 19 AM. J.L. HIST. 280, 294-95 (1975).

47. 77 Eng. Rep. 379 (K.B. 1608).

48. See 1 PHILLIP BRUCE, INTELLECTUAL HISTORY OF SEVENTEENTH-CENTURY VIRGINIA Part 1, chs. II-V, VII-IX; Part 3, ch. I (1910).

49. See ROEBER, *supra* note 45, at 62-63, 73, 76-77, 83-89. A colonial statute of 1658

Antilegalism was more pronounced in the Seventeenth Century New England and middle colonies. Settled mostly by religious dissenters who opposed the Crown, the antilegalism of these colonists was based upon the view that English society had become deeply corrupted. In the famous words of Perry Miller, the Puritans who came to New England were on an "errand into the wilderness," to build a model community.⁵⁰ Quoting from the book of *Matthew*, in 1629 John Winthrop told the first Puritan settlers who came to Massachusetts that their mission was to build "a city upon a hill." This would require a major reformation of traditional English law.⁵¹

Within the first several decades of their settlement of New England, early Puritans had created a new body of law that was the centerpiece of new orthodoxy. This law bore the unmistakable mark of legal sophistication. It drew upon a diversity of legal traditions and lawmakers shaped law to render it suitable to present circumstances.⁵² Nevertheless, one impulse for the successful advocacy of the deputies for the publication of codes of law in Massachusetts (just a decade earlier than the unsuccessful advocacy for code law in England) was to make law more accessible to lay persons. Further, a central feature of the law of Seventeenth Century New England was that it was closely associated with the moral values of the community. Old Testament legal precedent was highly influential, especially as a source of code law. Local arbitrators decided cases according to the golden rule.⁵³ The lawmaking of magistrates, who acted both as legislators and judges in early Massachusetts, as well as that of deputies, was highly influenced by the views of prominent clerics.⁵⁴ Church courts as well as civil courts were important in resolving not only religious, but also social and economic conflicts.⁵⁵ In addition, reflecting a deep anti-lawyer sentiment, few

admonished courts to render judgments "according as the right of the cause and the matter shall appear unto them, without regard to any *imperfection*, default or want of form in any writ, return, plaint or process." Botein, *supra* note 12, at 133 (emphasis added).

50. PERRY MILLER, *ERRAND INTO THE WILDERNESS* ch. 1 (1956).

51. Winthrop proposed these ideas in a sermon, entitled *A Model of Christian Charitie*, given to Puritan migrants to the New World on the *Arabella* in 1629. See MILLER, *supra* note 50, ch. 1.

52. See generally GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* (1960).

53. According to the Reverend Thomas Hooker of Connecticut, law was to conform to "the practice of the Jewish Church directed by God." Botein, *supra* note 12, at 130. In 1836, the Reverend John Cotton of Massachusetts drafted a code entitled, "Moses, his Judicials." BENJAMIN FLETCHER WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 23 (Russell & Russell 1962). On arbitration according to the golden rule, see KENNETH A. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST ONE HUNDRED YEARS*, DEDHAM, MASSACHUSETTS, 1636-1736 ch. 1 (1970).

54. See EDMUND S. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 163-64* (Oscar Standlin ed., 1958).

55. See HASKINS, *supra* note 52, ch. VIII.

lawyers practiced in the New England colonies during the Seventeenth Century.⁵⁶

This was also true of the middle colonies settled by the Friends. The dearth of lawyers reflected the view of the founder of their religion, George Fox, that "blackness" enveloped lawyers. Reflecting the preference of the Friends for simplicity, a Pennsylvania statute of 1701 instructed courts to demand "brevity, plainness and verity, in all declarations and pleas."⁵⁷ Lawmakers of New Jersey, another colony settled by the Friends, also leavened the strict justice of English legal precedents with their own views of what was equitable.⁵⁸

The history that Papke relies upon in *Heretics* suggests a transformation from the morally-based legal culture of the early colonies to a strict rule of law during the Eighteenth Century.⁵⁹ In addition to factors, notably the rising commercial activity already discussed in Part I, a growing pluralism also fostered reliance upon formal legal institutions in the Eighteenth Century colonies. The "Great Awakening" of religious sentiment, along with immigration, spawned the rise of many sectarian churches undermining the authority of established churches like the Congregational Church in New England and the Episcopal Church of the South. When people from different churches became involved in failed debt transactions, they now had to take their disputed transactions to local courts for resolution.⁶⁰ Such changes seem to support the view of one historian who pictured the Puritan becoming a Yankee during this century.⁶¹

But the moralistic Puritan did not become a legalistic Yankee so quickly. One basis for this conclusion is a streak of antilegalism in merchants, not only in the Eighteenth Century, but throughout history, who preferred to have their disputes settled quickly and inexpensively by arbitration or reference tribunals rather than by the complex and uneconomical litigation of the common law.⁶² Further, some of the immigrants who settled in the colonies during this century were antilegalistic.⁶³

56. John Winthrop, the most powerful leader of the colony, had been forced to leave law practice in England because of his religious beliefs. The *Body of Liberties* of 1641 forbade the payment of fees for legal representation, see GAWALT, *supra* note 20, at 8, and not until 1673 did law give formal recognition to practicing law in Massachusetts, see Botein, *supra* note 12, at 131.

57. Botein, *supra* note 12, at 132.

58. Stephen B. Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 RUTGERS-CAMDEN L.J. 262, 290 (1975).

59. PAPKE, *supra* note 4, at 8-9.

60. See BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 164-69 (1987).

61. See RICHARD L. BUSHMAN, *FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765* at ix (1967).

62. See 2 ALEXANDER HAMILTON, *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 379-80 (Julius Goebel ed., 1964); M. Klein, *The Rise of the Bar New York Bar: The Legal Career of William Livingston*, 15 WM. & MARY L.Q. 334, 342 (3d series, 1958); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132-38 (1934).

63. One example is the Germans in Pennsylvania, who settled disputes within their own

More important, an impetus to Eighteenth Century antilegalism was the Great Awakening of religious sentiment. It affected all of the colonies by the second quarter of the century. Illustrative of just how pervasive was its influence, revivalism touched commercial seaports as well as the agrarian hinterlands.⁶⁴

The revivalism of the Great Awakening undermined legalism and in its most radical form offered an alternative to the established legal and social order. The leading revivalist minister George Whitefield warned the believer against becoming a lawyer, and there are evidences that such pleas stirred up old anti-lawyer sentiments.⁶⁵ More generally, the evangelical clergy critiqued law as "too rational, too complex, and too much under the control of designing intellectuals."⁶⁶ The Great Awakening revived a pervasive moral sentiment that included the view that law should reflect moral values. For example, in Virginia, evangelicals advocated before magistrates for a closer nexus of law and morality, while lawyers advocated for a strict legalism.⁶⁷ Even more profoundly, the Great Awakening revived a community of believers that provided a powerful alternative model to the existing hierarchical and deferential legal order. In describing Virginia's Baptists, Rhys Isaacs observed that their "salvationism and sabbatarianism effectively redefined morality and human relationships; their church leaders and organization established new and more popular foci of authority, and sought to impose a radically different and more inclusive model for the maintenance of order in society."⁶⁸

B. The Revolutionary Period

By the mid-Eighteenth Century, then, there was a growing unrest in the colonies with strict English law. After the successful conclusion of the French and Indian War in 1763, protests that would lead to the American Revolution began. Though during the 1760s protesters often rooted their claims in English law, there was also a growing mob activity that sometimes disrupted court proceedings and resulted in acts of violence against lawyers and legal officials. As Stephen Presser has observed: "This was not a banner period for the rule of law."⁶⁹ By the 1770s patriots turned to attacking English law as another example

communities, in which the clergy was an influential source of social authority. In 1761 a German-language newspaper in that colony advised against electing lawyers to the provincial assembly "because what is to their profit is often to the farmers' loss." Botein, *supra* note 12, at 139.

64. See CHRISTINE LEIGH HEYRMAN, *COMMERCE AND CULTURE: THE MARITIME COMMUNITIES OF COLONIAL MASSACHUSETTS, 1690-1750* chs. 5, 11 (1984).

65. As anti-lawyer sentiment rose in mid-Eighteenth Century Virginia, lawyers defended themselves by trying to claim country virtue. See ROEBER, *supra* note 45, at 113.

66. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 255 (1971).

67. See ROEBER, *supra* note 45, at 112-13, 126.

68. Rhys Isaacs, *The Nature of the Baptist Challenge to the Traditional Order*, 34 WM. & MARY L.Q. 345, 369 (1974).

69. Presser, *supra* note 58, at 311. See generally *id.* at 311-17.

of the corruption of their colonial rulers. The most famous example of this view, of course, was the Declaration of Independence. Drafted by Jefferson, it contained a list of indictments against the rule of George III and claimed that the colonists were endowed with inherent natural rights that English law could not violate.

By the 1780s Americans, successful in their revolution against England, began to reconstruct a legal order for their new nation. The conventional story emphasizes the replacement of the Articles of Confederation government, a league of the states that had no centralized judiciary, with the more powerful central government and judicial system of the Federal Constitution. This history recognizes the opposition of the Anti-Federalists to the Federal Constitution, but trivializes it.

Just as much as the Federalists, the Anti-Federalists believed in a rule of law.⁷⁰ But unlike the Federalists they advocated for a legal system of popular justice rooted in community. Their approach to law was part of a vision for a more democratic society than that envisioned by Federalists.

The debate over the proposed federal judiciary was one of the critical differences that separated Federalist supporters and Anti-Federalist opponents of the new Constitution. While Anti-Federalists were not monolithic in their views, including those relating to law,⁷¹ they believed that the primary purpose of law was to protect individual liberties. They stridently attacked the proposed federal judicial system because they believed that it was too distant from the people and too powerful, and that it therefore threatened individual liberties.⁷²

The Anti-Federalist alternative to the large territorial union and the federal judiciary created by the Federal Constitution was a "small republic" with a popular legal system.⁷³ For the people to "have a confidence in, and respect for" law, Anti-Federalists insisted that laws must be made by institutions that were close to them and that reflected community values. This required a population

70. The *Letters from the Federal Farmer* argued:

The great object of a free people must be so to form their government and laws, and so administer them, as to create a confidence in, and respect for the laws; and thereby induce the sensible and virtuous part of the community to declare in favor of the laws, and to support them without an extensive military force.

LETTERS FROM THE FEDERAL FARMER, *reprinted in* 2 HEBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 214 (1981). Storing argues that to appreciate such statements by Anti-Federalists we should translate fear of standing armies into fear of a large bureaucracy. 1 STORING, *supra*, at 16-17 & n.12.

71. Storing emphasizes their diversity when he states that "[t]here is in fact no hard and fast way of even identifying 'Anti-Federalists.'" 1 STORING, *supra* note 70, at 5.

72. That Anti-Federalists did not attack the doctrine of judicial review, proposed by Alexander Hamilton, in *Federalist* 78, probably reflects more the ill formed nature of the doctrine in that period, rather than their acceptance of it.

73. See 1 STORING, *supra* note 70, ch. 3. Some Anti-Federalists cited Montesquieu as authority for the view that only a small republic could survive, and that only in it would law reflect the public interest. See LETTERS OF CATO, *reprinted in* 2 STORING, *supra* note 70, at 110.

that was homogeneous, most especially in the wealth that each citizen possessed.⁷⁴ Ideally, law would be made in a direct democracy, which is why Anti-Federalists were such strong supporters of jury trials.⁷⁵ But Anti-Federalists recognized that direct popular participation in lawmaking was not always possible. They therefore also favored lawmaking by legislators who remained close to the people and shared their interests.⁷⁶ Such a legal system, indeed, constituted "[t]he essential parts of a free and good government."⁷⁷

The popular legal system of a small republic supported by Anti-Federalists reflected the localistic bent of their ideology. Though they recognized the need for a national government to regulate interstate commercial transactions and relations with foreign nations,⁷⁸ they believed that the national government established by the Federalists would undermine the closeness of the people to lawmakers.⁷⁹ Anti-Federalists therefore championed the exercise of governmental powers by the states.⁸⁰

74. Melancton Smith wrote that representatives "should be a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests." MELANCTON SMITH, *SPEECHES DELIVERED IN THE COURSE OF DEBATE BY THE CONVENTION OF THE STATE OF NEW YORK ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (June 21, 1788), *reprinted in* 6 STORING, *supra* note 70, at 157.

75.

The jury trial, especially politically considered, is by far the most important feature in the judicial department in a free country Juries are constantly and frequently drawn from the body of the people . . . and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department. If the conduct of the judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases.

LETTERS FROM THE FEDERAL FARMER (Jan. 18, 1788), *reprinted in* 2 STORING, *supra* note 70, at 320.

76. The legislative branch of government "must possess abilities to discern the situation of the people and of public affairs, a disposition to sympathize with the people, and a capacity and inclination to make laws congenial to their circumstances and condition." LETTERS FROM THE FEDERAL FARMER (Dec. 31, 1787), *reprinted in* 2 STORING, *supra* note 70, at 265.

77. LETTERS FROM THE FEDERAL FARMER (Oct. 9, 1787), *reprinted in* 2 STORING, *supra* note 70, at 230.

78. Federalists, who ultimately came to advocate for a strong national government, were very adroit in framing the terminology of their debate with Anti-Federalists. 1 STORING, *supra* note 70, chs. 1, 4.

79. Brutus feared that Congress, pursuant its authority to make all laws necessary and proper to execute its enumerated powers "may so exercise this power as entirely to annihilate all the state governments, and reduce the country to one single government." ESSAYS OF BRUTUS (Oct. 18, 1787), *reprinted in* 2 STORING, *supra* note 70, at 367.

80. For example, in *Letters from the Federal Farmer*, October 8, 1787, the writer considers alternatives akin to the Articles of Confederation with a weak national government, a strong national government with little state power, and a federal union in which we "consolidate the stâtes

Another basis for Anti-Federalist support for popular justice was that they favored lawmaking shaped by the moral values of the community. We can infer this from the Anti-Federalists' insistence upon virtue as absolutely necessary to sustain a viable republic. It is also suggested by the insistence of some Anti-Federalists that a degree of religious establishment be maintained in the new nation.⁸¹

It was not just Anti-Federalists who opposed the adoption of a strict rule of law and supported an alternative of a more popular and local justice during the 1780s. The educated lawyer *par excellence*, Jefferson, engaged in two efforts that, had they been successful, would have given a popular justice alternative a substantial foothold in the new republic. In 1779, proclaiming that many laws "hertofore in force . . . are founded on principles heterogeneous to the republican spirit," Jefferson proposed a code of laws suitable to a republican form of government. He, along with other leading Virginians, began this project, but did not complete it.⁸² Five years later, in 1784, Jefferson drafted an ordinance for the government of the West. In addition to indigenous constitutions, it envisioned community tribunals and legislative statutes as the sources of law for territories of the new region.⁸³ Jefferson's Ordinance, however, was soon superceded by a more permanent and legalistic blueprint for the government of the western territories, the Northwest Ordinance.⁸⁴

Further, popular protest against lawyers, especially as they collected debts through local court litigation, was widespread in America during the 1780s. The protracted war had ignited a spiraling inflation and dislocated traditional commercial ties, creating severe economic distress. Massachusetts was a hotbed of popular antilegalism. Towns petitioned the legislature to restrict the practice of lawyers, and it responded with laws allowing lay persons to represent

as to certain national objects, and leave them severally distinct independent republics, as to internal police generally." LETTERS FROM THE FEDERAL FARMER (Oct. 8, 1787), *reprinted in* 2 STORING, *supra* note 70, at 298-99. The writer concluded: "The third plan, or partial consolidation, is . . . the only one that can secure the freedom and happiness of this people." *Id.* at 229. *See also* 1 STORING, *supra* note 70, ch. 4.

81. *See* 1 STORING, *supra* note 70, at 20-23.

82. *See* EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW at xii (1978). *See also* ELIZABETH G. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836, at 117-18 (1964).

83. Jefferson's commitment to popular participation in lawmaking in the western territories is shown by the following critical passage of the Ordinance of 1784. Resident adult males were to "meet together for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of these states . . . and erect . . . counties or townships for the election of members of their legislatures." Richard P. Cole, *Community Justice and Formal Law: The Jurisprudence of the Western Ordinances*, 16 L. STUD. F. 263, 268 (1992) (quoting the Ordinance of 1784) [hereinafter *Community Justice and Formal Law*].

84. Suggesting the strength of antilegalist sentiment, the Northwest Ordinance, however, was vague and incomplete about law, leaving many important issues to be resolved later. *See id.* at 268-69.

themselves in litigation.⁸⁵ In 1786, indebted farmers of western Massachusetts rebelled, forcibly closing courts that collected debts in their region.⁸⁶ Perry Miller uncovered a shred of evidence suggesting that the antilegalism of debtors was not something new in Massachusetts in 1786.⁸⁷

The most renowned antilegalist of post-revolutionary Massachusetts was the Boston artisan, Benjamin Austin, Jr. In 1786 he published his views on law in an important series of letters in a Boston newspaper under the name "Honetus."⁸⁸ As would Elizabeth Cady Stanton several generations later, Austin advocated for a literal application of the principles of the Declaration of Independence, in this case to the process of lawmaking. This led him to a virulent attack upon lawyers. Austin believed that they were politically too powerful, and wielded this power to establish an intricate and expensive legal system that effectively denied justice to the people. He therefore called for the "annihilation" of the legal profession. As for common law, Austin asked: "Can the monarchical and aristocratical institutions of England be consistent with the republican principles of our Constitution? . . . We may as well adopt the law of the Medes and Persians."⁸⁹

85. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 214-20 (1911). Warren uncovered a petition to the legislature from "the conservative little town of Braintree, close to Boston," imploring:

We humbly request that there may be such laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers, the completion of whose modern conduct appears to us to tend rather to the destruction than the preservation of the town.

Id. at 215 (quoting CHARLES FRANCIS ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY (1892)).

Roscoe Pound agreed with Warren, noting that the revolution "set back" the training of lawyers and reception of common law in America. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 7 (1938).

86. Two important accounts of Shays Rebellion and its background are found in DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980); and ROBERT JOSEPH TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION (1954).

87. Miller found a document written by John Adams describing antilegalist sentiment he encountered among Washington's army during the siege of Boston in 1775. Adams observed that: "If the Power of the Country should get into such hands, and there is great danger that it will," all of the efforts directed against colonial rule would be in vain. He at last consoled himself that: "The good Sense and Integrity of the Majority of the great Body of the People" would constrain popular antilegalism. THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 191-92 (Perry Miller ed., 1862) [hereinafter THE LEGAL MIND IN AMERICA]. See also Gordon S. Wood, *The Worthy Against the Licentious*, in THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES (Gordon S. Wood ed., 1973).

88. See Edwin C. Surrency, *The Pernicious Practice of Law—A Comment*, 13 AM. J. LEG. HIST. 241, 242 (1969).

89. MILLER, *supra* note 16, at 106. See also WARREN, *supra* note 85, at 219. In calling for the annihilation of the legal profession, Austin observed that it was becoming "more and more powerful. . . . The people should be guarded against it as it might subvert every principle of law

Austin's alternative to the legal system he attacked envisioned legislative codes replacing common law. In civil proceedings people would represent themselves, and in criminal cases they would be represented by the Attorney General. Jurors, who were to decide questions of both fact and law, and referees were to render decisions according to principles of natural justice. The result would be laws that treated the rich and poor equally.⁹⁰

Antilegalism did not manifest itself everywhere during the late Eighteenth Century.⁹¹ Further, local manifestations of antilegalist sentiment of the 1780s, like that of the Anti-Federalists, was not of a radical variety. It accepted the necessity of law and limited its fire to an attack of a professional and legalistic rule of law.⁹² Still, it was only after a fierce and protracted struggle that the Federalists finally succeeded in getting the new Constitution adopted. Historians have generally assumed that once the Constitution was in place, its opponents embraced the new document and their influence in American culture disappeared. To the contrary, the Anti-Federalist vision powerfully shaped the most basic features of American culture between the Revolution and the Civil War.⁹³ It provided the foundation for a continuing popular critique of the rule of law in post-revolutionary America.

C. *The Persistence of Antilegalism in the New Nation*

To paraphrase Roeber's conclusion about antilegalism in Eighteenth Century Virginia,⁹⁴ available historical sources render it impossible to gauge either the breadth or depth of this sentiment in post-revolutionary America. While it did not manifest itself in all of the American states, there is surviving evidence of antilegalist sentiment in all classes and all sections of the new nation.⁹⁵ It is enough to demonstrate, in contrast to Papke's assertion cited earlier, that there did exist a serious antilegalism that contested the rise of the rule of law in the new nation.⁹⁶

and establish a perfect aristocracy." *Id.* Austin characterized lawyers as "not only a useless but a dangerous body to the public." *Id.*

90. See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 32-39 (1976). In the wake of Shays Rebellion, John Quincy Adams, like his father, became concerned about antilegalism. He complained about the "popular odium which has been excited against the practitioners in this Commonwealth." ELLIS, *supra* note 66, at 113-14. See also WARREN, *supra* note 85, at 220.

91. Professor Nolan found little evidence of it in Maryland. Dennis R. Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969, 969-71 (1976).

92. In his letters attacking the pernicious practice of the law Austin is careful to make this distinction. See Surrency, *supra* note 88, at 242-43.

93. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 258-60 (1992).

94. ROEBER, *supra* note 45, at 251

95. Both Ellis and Gawalt give many examples of antilegalism in the new nation. ELLIS, *supra* note 66; GAWALT, *supra* note 20, at 63-64.

96. See *supra* note 10 and accompanying text.

This is difficult to fathom because antilegalism failed to thwart the rise of the rule of law in Nineteenth Century America. But antilegalism prior to the Civil War did enjoy great success in constraining assertions of federal lawmaking authority that would diminish state authority and establish uniform federal law. Early examples of resistance to federal assertions of authority include the passage of the Eleventh Amendment to overrule the Supreme Court's holding in *Chisholm v. Georgia*⁹⁷ that a state could be sued by a citizen of another state in a federal court. Also important were the Virginia and Kentucky Resolutions challenging the validity of the Alien and Sedition Acts of the late 1790s. They asserted that Congress could not pass laws that exceeded its enumerated powers and made the more radical claim that the states had the power to judge the legality of the exercise of federal powers. In 1803 St. George Tucker appended a long essay to his edition of Blackstone's *Commentaries* expounding the doctrine of state sovereignty within the American system of government.⁹⁸

During John Marshall's tenure as Chief Justice, the Supreme Court made bold assertions of federal powers vis-a-vis those of the states. In *Martin v. Hunter's Lessee*,⁹⁹ the court struck down a Virginia law confiscating the Fairfax lands as contrary to a federal treaty. When Spencer Roane, Chief Justice of the Virginia Court of Appeals, refused to enforce the decision, arguing that section twenty-five of the Judiciary Act of 1789 granting federal courts jurisdiction to review the decisions of state courts was unconstitutional, the Supreme Court upheld its constitutionality.¹⁰⁰ The Marshall Court also asserted a broad federal authority to regulate the economy, notably in *McCulloch v. Maryland*¹⁰¹ and *Gibbons v. Ogden*.¹⁰² But assertions of federal authority in the early republic had little real social impact. In the critical area of regulation of the economy, for example, the Court also recognized the power of the states to regulate the economy when the federal government chose not to exercise it.¹⁰³ This was an important admission, for during this period, state law, rather than that of the federal government, was primary in fostering economic activity.¹⁰⁴ Also of great significance was the Supreme Court's refusal to uphold Justice Story's attempt, while riding the federal circuit, to establish a uniform federal commercial law.¹⁰⁵

Further, though the decision in *Marbury v. Madison*¹⁰⁶ had clearly established the power of judicial review, the Supreme Court exercised the power only

97. 2 U.S. (2 Dall.) 419 (1793).

98. See KAMMEN, *supra* note 22, at 51-52.

99. 11 U.S. (7 Cranch) 603 (1812).

100. *Id.* at 603.

101. 17 U.S. (4 Wheat.) 316 (1819).

102. 22 U.S. (9 Wheat.) 1 (1824).

103. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

104. See OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, 1774-1861* chs. 3, 5, 8 (1969).

105. See *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,766).

106. 5 U.S. (1 Cranch) 137 (1803).

sparingly during the entire period before the Civil War.¹⁰⁷ The restraint of the court in exercising its ultimate power may have been a reaction to popular attacks upon the powers of the Supreme Court in the new nation. A number of bills filed in Congress during the early Nineteenth Century proposed limits upon the jurisdiction and powers of the Supreme Court.¹⁰⁸ In a letter written to Judge Roane in 1819, Jefferson attacked the doctrine of judicial review. Pursuant to this doctrine, the Constitution, wrote Jefferson, "is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."¹⁰⁹ Some sources suggest a widespread popular dismay over the Constitution. In 1793 the Federalist, John Sergeant, a member of the lower house of the Pennsylvania legislature, expressed concern over hearing the "whole Constitution denounced, and a decided hostility to it boldly avowed."¹¹⁰ In a letter to John Adams in 1808 Benjamin Rush observed of the Constitution that "I cannot meet a man who loves it," because half the people think it too weak and the other half too strong.¹¹¹

In addition to the new body of constitutional law, the other building block of Nineteenth Century American legal culture was the adoption of an old body of English law, the common law. America's legal elite resolutely and successfully advanced the adoption of this body of law. But even members of the legal elite recognized that there was an artificial quality to English common law that required it to be adapted to the changed circumstances of the new American culture. At the very least common law had to be shorn of its arcane technicalities, a task that one of Massachusetts' most elite lawyers, Theopolis Parsons, addressed when he was appointed Chief Justice of the state's Supreme Judicial Court in the early years of the Nineteenth Century.¹¹²

During the late Eighteenth and early Nineteenth Centuries there also continued to appear encompassing critiques of the common law, typically coupled with advocacy for popular justice. Although there were important differences among post-revolutionary antilegalists, in accord with Anglo-American tradition, this antilegalism often began with a utopian golden age of

107. Between 1789 and 1869 the Court invalidated just six congressional acts. See KAMMEN, *supra* note 22, at 31. Only in 1857, in *Dred Scott*, did it invalidate a state statute. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

108. See KAMMEN, *supra* note 22, at 76. Between 1823 and 1831 Congress introduced twelve bills to curb the Court in some manner. See *id.*

109. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 140-42 (Paul Leicester Ford ed., 1892-1899).

110. KAMMEN, *supra* note 22, at 46 (quoting Letter from John Sergeant to Thomas Biddle, Jan. 10, 1808).

111. *Id.* at 73-74. Kammen himself concluded: "[T]he cult of the Constitution did not arise as early, nor so pervasively, as scholars have believed. . . . I do not see a strong constitutional consensus emerging almost from the start." *Id.* at 46.

112. See ELLIS, *supra* note 66, at 212-24. One of the early Nineteenth Century legal reforms in Massachusetts was the replacement of the common law system of writ pleading with a much simpler fact pleading. See NELSON, *supra* note 2, ch. 5.

simple law. There existed both religious and neoclassical roots to the golden age image in literature of the period, and it was reinforced by the widely-held view that some day Eden would be recreated in a region to the west.¹¹³

The most common legal golden age in early republican literature was again the law of Anglo-Saxon England. Jesse Higgins, who had suffered the agony of entanglement in protracted litigation in the chancery court, identified the golden age as the reign of Good King Alfred. During it, a highly decentralized body of local courts decided cases according to a natural justice without written law. Higgins implored Americans to recapture their lost Anglo-Saxon heritage by restoring trial by jury to its pristine vigor.¹¹⁴

The foremost exponent of the purity of Anglo-Saxon law was Jefferson. His scattered writings on law are hard to render consistent, but from them one can piece together a frontal attack upon English common law. Jefferson espoused the purity of Saxon law and believed that the Norman Conquest had sullied it. This view of history led Jefferson to resist the repeated assertions of elite defenders of the common law that it was a moral body of law.¹¹⁵ Further, always suspicious of the exercise of judicial discretion, Jefferson was dismayed by the reworking of common law effected by Mansfield during his long tenure as England's leading jurist. As for Blackstone, Jefferson came to view him as "honeyed Mansfieldism."¹¹⁶

The most intellectually vibrant, satirical and popular rendition of a legal golden age in the literature of the early republic was Washington Irving's *A History of New York*.¹¹⁷ "[A] comedy of confusion [that] ridicule[d] order and system within the world,"¹¹⁸ it relentlessly critiqued those who believed in progress, as quintessentially represented by the republican politics and neoclassical style of Jefferson, and by the vision of the Founders of a polity based upon a rational legal order. *A History* begins with a golden age in early New Amsterdam. In it plump and idle burghers lived amidst plenty, with little need for law. The infiltration of law into this blissful community was both a cause and a sure sign of its decline. A governor too learned in law, who passed "a multitude of good-for-nothing laws"¹¹⁹ was followed by the famous Peter

113. Evangelicals revived religious utopianism, while in neoclassical thought the golden age was traceable to ancient writers, notably Ovid. See BLOOMFIELD, *supra* note 90, at 32-33. See HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS A SYMBOL AND MYTH* (1950), on the general imagery associated with the Nineteenth Century West.

114. See JESSE HIGGINS, *SAMPSON AGAINST THE PHILISTINES* (2d ed. 1805).

115. See Part III on this claim of the legal elite. For example, in an important passage of his *Commentaries* Blackstone claimed that the common law reflected Christian morality.

116. *Community Justice and Formal Law*, *supra* note 83, at 274.

117. WASHINGTON IRVING, *DIEDRICH KNICKERBOCKER'S A HISTORY OF NEW YORK* (Stanley Williams & Tremaine McDowell ed., Harcourt, Brace, 1927) (1809).

118. FERGUSON, *supra* note 14, at 166 (quoting WILLIAM L. HEDGES, *WASHINGTON IRVING: AN AMERICAN STUDY* 262 (1965)).

119. *Id.* at 156 (quoting IRVING, *supra* note 117, at 211). "William the Testy is 'smothered in a slough' of [] learning. 'Full of scraps and remnants of ancient republics . . . and the laws of

Stuyversant, who completed the debacle by negotiating legalistic treaties with neighbors. By then “the ‘galling scourge of the law’ and ‘the herds of pettifogging lawyers’” was undermining the Dutch culture of early New York.¹²⁰ Not only that, but Irving also catalogued a number of atrocities affected by the law. They included the stealing of land from Native Americans and the hanging of alleged witches in Salem, as well as many instances of the rich manipulating law to oppress the poor. Irving often pictured law as a “deliberate sham,” covering the reality of “law as dangerous illusion.”¹²¹

There are other works of early republican literature that critique law without resort to a utopian golden age. An excellent example is a number of the works of Charles Brocton Brown at the end of the Eighteenth Century. They included a root and branch critique of a rule of law. Brown suggested that a rational law was beyond human capacity and that law did not address the important questions of human life. Law afforded no protection for Brown’s protagonists and they in turn refused to resort to legal institutions to resolve problems that they faced.¹²²

Advocacy for popular justice in the new nation was not just confined to literature. Examples of it can be found in each section of the country, though its intensity and purposes differed in each.

Antilegalist sentiment was widespread in the South, but it was constrained to the moderate goal of reducing the legalism of established legal institutions. For example, in 1811 the Virginian, Henry Banks, published *Propositions Designed to Simplify and Expedite the Administration of Justice*. It attacked both the state’s judiciary and the avarice of swarming lawyers. Banks proposed a local justice without legalese, with simple procedures, and in which lay juries would decide cases.¹²³ A letter, also published in 1811 by CANDIDUS, attacked lawyers as absorbed in their own interests and laws as unnecessarily written and confusing.¹²⁴ The legal elite of the early Nineteenth Century South reacted to anti-lawyer sentiment by claiming the tradition of the country lawyer, creating Patrick Henry as a mythical prototype. A man of the people, Henry was a landowner and local squire who above all was a great orator.¹²⁵ Not coincidentally, he was also an Anti-Federalist in his politics who had argued

Solon and Lycurgus and Charondas, and the imaginary commonwealth of Plato, and the Pandects of Justinian.” *Id.* at 157 (quoting IRVING, *supra* note 117, at 180). William’s learning is “‘highly classic, profoundly erudite, and nothing at all to the purpose.” *Id.* at 158 (quoting IRVING, *supra* note 117, at 181-82).

120. *Id.* at 155 (quoting IRVING, *supra* note 117, at 123, 216). The ultimate symbol of destruction is the circuit-riding lawyer, “‘lean sided hungry pettifoggers, mounted on Narraganset pacers, with saddle bags under their bottoms, and green sachels under their arms, as if they were about to beat the hoof from one county court to another—in search of a law suit.” *Id.* at 156 (quoting IRVING, *supra* note 117, at 267).

121. *Id.* at 158.

122. *Id.* ch. 5.

123. See ROEBER, *supra* note 45, at 241-44, 250-51.

124. See *id.* at 251.

125. See WILLIAM WIRT, *THE LIFE AND CHARACTER OF PATRICK HENRY* (1817).

passionately against the distant and powerful government created by the Federal Constitution.

In the Northeast expressions of antilegalism were often coupled with pleas for forms of popular justice. Most moderate in tone was the Jeffersonians' (who were gaining strength even in the Federalist Northeast) support for the expansion of available institutions of local justice, and especially trial by jury.¹²⁶ Warren suggests that sentiment for the replacement of common law with code law continued to be widespread in Massachusetts.¹²⁷

Sentiment for arbitration as an alternative to common law litigation was strong in Pennsylvania. One proponent of this form of justice was the man who had most shaped patriot opinion during the Revolution, Tom Paine, although by the time he lent his gifted prose to the cause of arbitration his own prestige had been much reduced, at least among America's elite. In his last published pamphlet in 1805, in the midst of a hotly contested race for governor in Pennsylvania, and while that state was considering revisions to its original constitution of 1776, Paine attacked America's legalist order. He believed that American courts were far too dependent upon foreign law and inappropriate legal precedents. Paine believed that "[e]very case ought to be determined on its own merits," and by "the laws of [a man's] own country." As for lawyers, they were far too devoted "to form rather than to principles, and the merits of the case become obscure and lost in a labyrinth of verbal perplexities." Paine preferred arbitration because it was nonlegalistic and economical. Besides, who better to resolve disputes between merchants than merchants?¹²⁸ Another advocate for arbitration in Pennsylvania was William Duane, editor of the influential Jeffersonian newspaper, the *Aurora*. Critical of the mysteriousness of the common law, and one of the first commentators to recognize lawyers as America's new aristocracy, he wanted speedy, local trials decided by juries and a radical extension of arbitration.¹²⁹

But it was in the early West that antilegalism was most widespread and radical in its implications. Indeed, it was suggested by the conception of the West in contemporary literature. The image of the West was of the Garden of Eden, representing a movement backward to a more primeval and utopian environment. One reason for moving westward, which many Americans did in the frenetically mobile Nineteenth Century, was to disengage themselves from the constraints of civilization, including the law.¹³⁰ The West, then, offered an

126. See *Law and Community*, *supra* note 18, Part III.

127. He uncovered the following Fourth of July toast from Cambridge in 1801: "The Common Law of England: may wholesome statutes soon root out this engine of oppression from America." WARREN, *supra* note 85, at 227 (citing *Account of the Fourth of July Celebration in Cambridge*, COLUMBIAN CENTINAL (Boston), July 11, 1801).

128. See 2 THOMAS PAINE, THE COMPLETE WRITINGS OF THOMAS PAINE 996-97, 1003-04 (Philip S. Foner ed., 1945).

129. See WARREN, *supra* note 85, at 222-23.

130. See SMITH, *supra* note 113, bk. 2. The immediately following discussion of James Fenimore Cooper's literature supports this view.

opportunity to antilegalists, not available to their predecessors of the English Civil War and the Great Awakening, to escape the bonds of the law and to live a simpler and more liberated lifestyle by migrating westward.

The importance of the West to the yearning for a simple popular justice is suggested by the most important literary representation of the clash between popular justice and a strict rule of law of not only the early republican period, but the entire Nineteenth Century, James Fenimore Cooper's *The Pioneers*.¹³¹ Published in 1826, just two years before the ascension of the western hero Andrew Jackson to the presidency, the book was a "sensation." Its protagonist, Natty Bumppo, became so popular in American culture that he would appear in five of Cooper's novels.¹³²

Despite its date of publication, Cooper set his story over a generation earlier, in 1793, in the major American frontier of that period, upstate New York.¹³³ A child of nature and a legendary hunter, Bumppo was the first American settler of the region. But by the time of Cooper's story the West was experiencing the process of settlement and social transformation, brilliantly described by Frederick Jackson Turner's frontier thesis, that was recurrent in American history from the Seventeenth through the Nineteenth Centuries. Yeomen were establishing farms everywhere, and the institutions of civilization—schools, churches and the law—were becoming visible in every town. The transformation of the region was disconcerting to Bumppo, the more so when the legislature passed a law restricting the catching of fish and the killing of deer. When Bumppo violated it, he was brought before the court of the wealthiest and most influential person of the region, Judge Marmaduke Temple, a throwback to the paternal magistrates of colonial Virginia.

Bumppo was an unlearned man of a humble social background and his defense was that of a simple natural justice: "I may say not guilty with a clean conscience, for there's no guilt in doing what's right."¹³⁴ Though Judge Temple was a primary instigator of the legislature's passing of the game law, he seemed briefly to waver under the force of Bumppo's argument. Nevertheless, he directed the jury to adhere to the letter of the law and to find Bumppo guilty as charged.

Bumppo had saved the Judge's daughter, Elizabeth, from harm at the hands

131. JAMES FENIMORE COOPER, *THE PIONEERS* (Singer Classics ed. 1964) (1826).

132. *The Pioneers* would become the most widely read of Cooper's novels and the one most responsible for establishing his literary reputation. See G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, in III & IV OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 40-41 (1988) [hereinafter HOLMES DEVISE].

133. See PAUL W. GATES, *THE FARMERS AGE: AGRICULTURE, 1815-1860* ch. 2 (1960).

134. COOPER, *supra* note 131, at 374. Perry Miller drew parallels between Bumppo and Davey Crockett. When Crockett served as a justice of the peace he boasted that "I had never read a page in a law book in all my life." Still, appellants were never successful on appeal of his judgments, "as I g[i]ve my decisions on the principles of common justice and honesty between man and man, and rel[y] on natural born sense, and not on law learning to guide me." MILLER, *supra* note 16, at 102.

of a panther, and she protested his conviction to her father: "Surely, sir, those laws that condemn a man like Leather-stocking is so severe a punishment, for an 'offense' that even I must think very venial, cannot be perfect in themselves." Judge Temple conceded her point, but responded: "Society cannot exist without wholesome restraints . . . and respect to the persons of those who administer them." He added: "Try to remember, Elizabeth, that the laws alone remove us from the conditions of the savage . . ."¹³⁵ Temple did, however, give Elizabeth money to pay Bumpo's fine and ultimately Bumpo was pardoned. By the end of the book, Bumpo has fled further westward to escape the constraining forces of civilization for a more liberated and independent lifestyle.

Bumpo represented a deep cultural yearning in the new nation for a simple life lived in accordance with popular moral values. It is not surprising then that during the first half of the Nineteenth Century the West was alive with forms of popular justice. As had their ancestors who had come from England to the New World two centuries earlier, sectarian Protestant pioneers who settled in the early West established church courts to resolve their social and economic conflicts, including their debts.¹³⁶ There were also examples of important local persons resolving disputes by a simple, discretionary justice in the early West.¹³⁷ Sometimes the West's popular justice collided with technical rules of law, leading to violence. Settlers claimed priority of right to land and other assets of economic value, and there were examples of vigilante justice in the pre-Civil War West.¹³⁸

But a simple West with little law would not long survive. As large numbers of migrants moved westward and established new settlements, they brought with them the institutions of more advanced society. This engendered recurrent clashes between advocates of a strict rule of law (lawyers were always in the forefront of their ranks) and settlers attached to a popular law alternative. One example of such a clash was in late Eighteenth Century Kentucky. Based upon a Jeffersonian preference for limited government, some Kentucky settlers, especially those from its less populous districts, attacked lawyers as an educated and powerful elite. As an alternative to the common law they proposed establishing arbitration tribunals and available local courts, the latter rendering decisions based upon a code of simple laws understandable to lay persons. Although the proponents of this program achieved some measure of success, including the passage of a statute in 1795 authorizing arbitration, by the early Nineteenth Century a common law legal order was in place in Kentucky.¹³⁹ There were also recurrent pleas for the codification of the law in the early West,

135. COOPER, *supra* note 131, at 394-95.

136. See T. SCOTT MIYAKAWA, *PROTESTANTS AND PIONEERS: INDIVIDUALISM AND CONFORMITY ON THE AMERICAN FRONTIER Part I* (1964).

137. See MERLE CURTI, *THE MAKING OF AN AMERICAN COMMUNITY: A CASE STUDY OF A DEMOCRACY IN A FRONTIER COUNTY* 13-16 (1959).

138. See DANIEL BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* chs. 11-12 (1965); GATES, *supra* note 133, ch. 3.

139. See ELLIS, *supra* note 66, at 124-26, 137, 147, 150-51.

most notably those of Augustus Woodward, Chief Justice of the Supreme Court of the Territory of Michigan from 1805 to 1823, and by the Ohio lawyer, John M. Goodenow, in attacking the doctrine of a common law of crimes.¹⁴⁰

Another recurrent clash as Americans moved westward during the Nineteenth Century was between common law and the legal cultures of diverse traditional communities of Native Americans and Europeans already in the West. The usual result of such clashes was that the common law obliterated the earlier legal culture.¹⁴¹ The result of clashes between the common law legal order and popular justice, not just in the West but throughout the nation, also normally resulted in the triumph of the former, albeit with accommodations made for a readily available local justice. This was usually effected through the availability of arbitration or reference, the expansion of the jurisdiction of the justice of the peace court, and the restructuring of county and circuit court jurisdiction.¹⁴²

Within the historical context of clashes between common law and its competitors, and the repeated triumphs of common law, Cooper's attitude concerning the rule of law and popular justice is noteworthy. It is also not without ambiguities. Bumppo is the hero in *The Pioneers*, but Cooper did not embrace his simple justice. Instead, he accepted the frontier process in which new societies were created out of wilderness and Judge Temple's view that law was integral to the transformation.¹⁴³ But it is equally clear that Cooper was repulsed by the democratic culture that he perceived to be emerging in America by the Jacksonian period. This is suggested by his portrayal of social classes in *The Pioneers*,¹⁴⁴ and is made more clear in *Home as Found*,¹⁴⁵ written fifteen years later and set in the 1830s. In it Cooper compares American society to "a runaway carriage crashing downhill." The social bonds of hierarchy had been rent asunder and American life was now characterized by "envy, rapacity,

140. *Law and Community*, *supra* note 18, Part III. Goodenow portrayed common law as, "founded in the darkest ages (of English feudalism), supported by usages, through the most barbarous revolutions." *Id.* at 221 (quoting John Goodenow, *Historical Sketches of the Principals and Maxims of American Jurisprudence*, in 17 CLASSICS OF LEGAL HISTORY 2-3 (Roy M. Mersky & J. Myron Jacobstein ed., 1972)). In light of the "stupendous" change characteristic of his own time, Goodenow concluded that at least English criminal law was unsuited to the circumstance of America's republican future. *See id.* at 221-22.

141. *See* ARNOLD, *supra* note 18; *Law and Community*, *supra* note 18, Parts I, III.

142. *See* *Law and Community*, *supra* note 18, Part IV.

143. Cooper observed that "the whole district is hourly exhibiting how much can be done, in even a rugged country, and with a severe climate, under the domination of mild laws, and where every man feels a direct interest in the prosperity of a commonwealth of which he knows himself to form a part." COOPER, *supra* note 131, at 13-14.

144. Cooper pictures the upper class, including Judge Temple, becoming more moderate and virtuous. In contrast, his characterization of middle and lower class persons are negative. White, *supra* note 132, at 43-44. Bumppo, of course, is an exception to this general characterization, though he is more of a model for civilization rather than truly being a part of it.

145. JAMES FENIMORE COOPER, *HOME AS FOUND* (Capricorn Books 1961) (1860).

uncharitableness, and all other passions of man 'unloosed.'"¹⁴⁶ His sense of loss of an earlier social order suggests why Cooper was one of those in the minority of old Federalists who became a Jacksonian Democrat.¹⁴⁷ Cooper's view of social change, accepting it to a degree but repulsed by a pell-mell rush to an industrial democracy, may suggest sympathy with the paternal justice of Judge Temple.¹⁴⁸ At the very least Cooper did not unambiguously embrace a strict rule of law.¹⁴⁹ In a later novel, *The Ways of the Hour: A Tale*,¹⁵⁰ Cooper, not unlike Garrison, took the position that God should replace the Constitution as the foundation of American liberties.¹⁵¹

More important than Cooper's sentiments was his acute perception of what was happening to contemporary America's legal culture. By the time Cooper wrote *The Pioneers* in 1826 the common law legal order had become firmly established in America and the legal profession had achieved a position of unprecedented prestige and power.¹⁵² Cooper therefore was right to set his story in 1795, and in a frontier region. In *Home as Found* he pictured Bumpo as a "mocking spirit" barely remembered by the 1830s.¹⁵³ Cooper insightfully recognized that American culture was changing very fast. At the very moment that he was creating a great folk hero who personified popular yearning for a simple popular justice, the forces of modernization were overtaking it, even in the West. The long tradition of support for popular justice in American history was at last receding.

D. The Decline of Antilegalism During the Remainder of the Nineteenth Century

Antilegalism continued throughout the Nineteenth Century. Though some of it would have radical implications for American society and culture, much of

146. FERGUSON, *supra* note 14, at 301.

147. Marvin Myers discerned a deep nostalgia for a simpler past was central to Jacksonian ideology, classically represented in Andrew Jackson's speech vetoing the recharter of the national bank in 1832. MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 19 (1957).

148. For example, Cooper pictures Judge Temple devoting considerable time to justifying his actions to those beneath his station, even to one of the remnant of the region's Native Americans. Like Tocqueville, Cooper pictured social bonds as warm in hierarchical society.

149. Who rightfully owned the land of this frontier region is a major issue of *The Pioneers*, and Cooper seems to accept the view that the only practical course is to uphold the claims of white settlers, which rest upon the arcane technicalities of the common law of property. But he sometimes directly attacked a strict rule of law, for many of the same reasons as had Irving. Cooper's lawyers were typically shallow or corrupted figures, and even Judge Temple was not above stain. Lawyers manipulated law to advance their own personal interests, or those of their clients, as when the Judge got the legislature to pass the law against killing deer.

150. JAMES FENIMORE COOPER, *THE WAYS OF THE HOUR: A TALE* (Gregg Press 1968) (1850).

151. See FERGUSON, *supra* note 14, at 304.

152. See *supra* note 16.

153. See FERGUSON, *supra* note 14, at 301.

it was now of a more moderate tone. Antilegalism of this genre did not present alternatives to the established legal system, but rather sought to reduce its legalistic qualities. Of whatever stripe, outbursts of antilegalism became more episodic after 1830 than they had been during the long period from 1760 to 1830.

1. *The Jacksonian Period.*—The Jacksonian period has a reputation as a high point of egalitarianism in American history. Antilegalism during this period did have an egalitarian bite, protesting against corporate monopolies and social privileges.¹⁵⁴ Evangelical religion provided the impulse for a closer nexus of morality and law.¹⁵⁵ It also was related to the emergence of antislavery agitation that would culminate in a major unsettling of America's social order. Nevertheless, except in less settled regions of the West,¹⁵⁶ examples of popular justice disappeared. The practices of both arbitration and trial by jury declined precipitously by the middle of the Nineteenth Century.¹⁵⁷ Further, while the tradition of localism continued in the Jacksonian period, it suffered some significant setbacks in the context of the slavery controversy. And many of those who resisted a strict rule of law were now members of America's elite favoring moderate reform aimed at rationalizing the law.

During the generation from 1820 to 1850 advocacy for the codification of law swelled. But now, instead of outsiders like Austin, advocacy for codes of laws came from within the legal profession itself and was no longer linked to an alternative of popular justice. For the most part even ardent advocates for codification agreed with defenders of the common law that the *raison d'être* of law was to order society. Most of what separated them was how best to effectuate this end.¹⁵⁸

Code advocacy began with a critique of common law. When articulated by the Irish immigrant, William Sampson, the attack was iconoclastic. He ridiculed the common law's ancient forms, like special pleadings and fictions, "which give it the air of occult magic," and characterized its lawmaking as akin to "judicial astrology." Forged by "semi-savage Saxons," who were "barbarians in a time of universal darkness," and in the age of kingship, common law doctrine was formed in conditions "essentially different" from those existing in America. Sampson concluded that continued devotion to common law by Americans was equivalent to "devotion to idols which their fathers had levelled in the dust."¹⁵⁹

Although Sampson's critique cut deep, all but the most dogmatic of defenders of the common law by this period conceded that it was marred by

154. See COOK, *supra* note 17, at 162.

155. See MILLER, *supra* note 16, bk. 2, Part IV.

156. See *supra* note 138.

157. See *supra* note 19; see also TRANSFORMATION, *supra* note 2, ch. V.

158. This is the conclusion of the most complete recent study of Jacksonian codification proposals. See generally COOK, *supra* note 17.

159. WILLIAM SAMPSON, AN ANNIVERSARY DISCOURSE, DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK: SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND THE NATURE OF THE COMMON LAW (Dec. 6, 1823), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 121, 132, 125-28, 130.

technicalities and anomalies. Further, while debunking the lineage of the historic common law, Sampson distanced himself from more radical advocates of natural justice by heaping scorn upon the Saxon golden age history. Most illuminating is that Sampson's justifications for code law were quite mainstream. He argued that code law would bring a large measure of simplicity and order to "trackless forests." It would constitute a cohesive body of law suited to contemporary American culture, one that could be easily understood and economically implemented. For Sampson, code law would actually reinforce the rule of law by limiting the exercise of judicial discretion.¹⁶⁰

The conventional quality of much of the advocacy for codification was illustrated by the writings of its leading southern proponent, Thomas Grimké. Grimké emphasized that law was a science. Just as the physical sciences ordered and arranged a seemingly disordered natural world, so legal science, especially a comprehensive body of code law, brought "simplicity and order" to the disparate sources of accumulated legal precedents.¹⁶¹ It was left to the reformist attorney, Robert Rantoul, to make an uncharacteristically radical claim for the codification of American law: "We must have democratic governors, who will appoint democratic judges, and the whole body of the law must be codified."¹⁶²

We should not overlook the result of code advocacy during this period. It failed almost entirely to achieve its objective. But it may have provided a bargaining chip for moderate reforms of the existing judicial system.¹⁶³

Attacks upon the legal profession continued during the Jacksonian period. A stinging critique penned by an unknown person named P.W. Grayson portrays lawyers as a greedy class destructive of both individual liberty and moral community.¹⁶⁴ Further, although they were politically powerful, lawyers were so

160. See *id.* at 132-33; see also HENRY DWIGHT SEDGWICK, ON AN ANNIVERSARY DISCOURSE DELIVERED BEFORE THE HISTORICAL SOCIETY ON SATURDAY, DECEMBER 6, 1823, SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND NATURE OF THE COMMON LAW, ARTICLE VIII, THE NORTH AMERICAN REVIEW 416-39 (Oct. 1823), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 136, 143-45.

161. See THOMAS SMITH GRIMKÉ, AN ORATION OF THE PRACTIBILITY AND EXPEDIENCE OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY OF A CODE, DELIVERED TO THE SOUTH CAROLINA BAR ASSOC. (Mar. 17, 1827), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 148, 148-49, 152-53.

162. ROBERT RANTOUL, ORATION AT SCITUATE (July 4, 1836), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 222, 225. Note, however, that in this statement Rantoul, though calling for a democratic body of law, accepted the practice of appointing, rather than electing, judges.

163. These reforms include the election of state and local court judges and perhaps moves to expunge technicalities from the judicial process including pleading. GAWALT, *supra* note 20, at 182-84. Professor Gordon argues that moderate reform as a way to parry more radical antilegalist claims was a persistent pattern in Anglo-American history. Gordon, *supra* note 37, 438-39.

164. P.W. GRAYSON, VICE UNMASKED, AN ESSAY: BEING A CONSIDERATION OF THE INFLUENCE OF LAW UPON THE MORAL ESSENCE OF MAN, WITH OTHER REFLECTIONS (New York, 1830), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 192. Like harlots they served

enmeshed in precedents that they lacked the vision to contribute constructively to the development of either individual liberties or community life.¹⁶⁵ Within the context of the democratic and anti-monopolistic ideology of the Jacksonian period, such attacks had an impact. Professional legal education markedly declined.¹⁶⁶ Local bar associations no longer set standards of admission for law practice and legislative statutes seemed to make it easier to become a lawyer.¹⁶⁷ The democratization and commercialization of American culture undermined the neoclassical culture of law and letters. David Dudley Field bore witness to the rise of a new breed of pettifoggers: "The bar is now crowded with bustling and restless men The quiet decorous manners, the gravity, and the solid learning, often conjoined in a former generation, are now rarely seen together."¹⁶⁸

Those who, in the Anti-Federalist tradition, favored state authority continued to have great success during the Jacksonian period in thwarting the economic nationalism of the Marshall Court. South Carolina's refusal to abide the federal tariff in 1832 ended in a standoff.¹⁶⁹ It was in the context of the Nullification Crisis that John C. Calhoun honed his theoretical framework for supporting states' rights against impositions by the federal government.¹⁷⁰ Despite his stance on the tariff issue, Jackson was decidedly not an economic nationalist. The great act of his presidency, of course, was his veto of the re-charter of the federal bank. The result was a major decentralization of the American monetary system.¹⁷¹ Further, the Taney Court moved away from the Marshall Court's economic nationalism.¹⁷² The Whig leader, Henry Clay, was never able to procure passage of his program of economic nationalism. The triumph of economic localism

the private interests of the highest bidders. Also, to obtain wealth lawyers pry into private affairs, "discern the ingredients of litigation, and blow them up into strife." *Id.* at 195.

165. See *id.* at 194-95.

166. A number of law schools failed, including Tapping Reeve's famous school at Litchfield, and even Harvard had almost no law students by the late 1820s. See 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 210-14, 194-97 (1965).

167. See *id.* at 129-72. Gawalt discusses major changes in legal education and bar admission during this period. GAWALT, *supra* note 20, ch. 5; but see *Law and Community*, *supra* note 18, Part IV (finding no decline in the standards of professionalism in Michigan during the Jacksonian period).

168. FERGUSON, *supra* note 14, at 201.

169. Though Andrew Jackson strongly asserted its legitimacy, Congress did accede to the wishes of its opponents by lowering its tariff rates.

170. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 27-29, 32-39 (1988); see also KAMMEN, *supra* note 22, at 52-55.

171. See EDWARD PESSEN, *JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS* 142-44, 308-13 (rev'd ed., 1978).

172. In the famous *Charles River Bridge* case, the Supreme Court, in an opinion written by its new Chief Justice, Roger Taney, upheld the authority of state legislatures to issue new charters that undercut the activity and profits of corporations with earlier charters. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). See also STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971).

during the Jacksonian period, however, was not complete. In 1842 Justice Story was at last able to establish the doctrine of a federal commercial law.¹⁷³ Still, the forces of localism were so strong that during this period no less than Marshall, Kent and Story despaired that all of their efforts to establish a national rule of law would come to nought.¹⁷⁴

But during this period there was a form of advocacy for states rights that utterly failed. This was legal attacks upon the federal fugitive slave laws.¹⁷⁵ The greatest success of the states' rights view in antislavery advocacy was in opinions of the Wisconsin Supreme Court in *In re Booth*,¹⁷⁶ but the United States Supreme Court soon overruled the decision.¹⁷⁷ During the entire pre-Civil War period, in no matter what form antislavery advocates attacked the authority of the federal government to pass or enforce fugitive slave laws, the federal courts doggedly enforced them by a legalistic jurisprudence.¹⁷⁸

Abolitionist advocacy was part of a broader antilegalist attack upon a rational rule of law during the antebellum period. Demanding the immediate end of slavery, abolitionists of the period measured laws supporting slavery against a higher moral law and found them wanting. For example, the political platform of the 1843 Liberty Party asserted that "the moral laws of the Creator are paramount to all human laws."¹⁷⁹ Some of the legal advocacy against the fugitive slave laws relied upon a dissonant array of natural law arguments. One example is the advocacy of the leading antislavery lawyer, Salmon P. Chase. In his first fugitive slave case, in which he argued that his client should have a presumption of freedom and a trial by jury, Chase implored the court to uphold "natural rights, derived . . . from the constitution of human nature, and the code of heaven . . . proclaimed by our fathers in the Declaration of Independence to be self-evident, and reiterated in our state constitutions."¹⁸⁰ In a later case before the Supreme

173. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

174. In the late 1820s Justice Marshall stated to Justice Story that "I begin to fear that our Constitution is not doomed to be so long lived as its real friends had hoped." In 1832 he wrote to Story: "[S]lowly and reluctantly [I yield] to the conviction that our Constitution cannot last." KAMMEN, *supra* note 22, at 51. Chancellor Kent and Justice Story were distraught over the *Charles River Bridge* decision. See Carl B. Swisher, *The Taney Period, 1836-64*, in V HOLMES DEVISE, *supra* note 132, at 92.

175. Robert Cover observed: "The fugitive's advocate stood four-square for states' rights and against extensions of national power." COVER, *supra* note 34, at 161.

176. 3 Wis. 1 (1854), *rev'd sub nom.* *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858). See also *Ex parte Booth*, 3 Wis. 145 (1854), *rev'd sub nom.* *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

177. *Ableman*, 62 U.S. (21 How.) at 506. See also COVER, *supra* note 34, at 166, 186-87.

178. Judges would typically interpret these laws according to their letter, claiming that they lacked power to do otherwise. It was such lawmaking that prompted Professor Cover to study antislavery jurisprudence.

179. WRIGHT, *supra* note 53.

180. Salmon P. Chase, Speech in the Case of the Colored Woman Mathilda Who, was Brought Before the Court of Common Pleas of Hamilton Co., Ohio, by Writ of Habeas Corpus

Court, Chase made his most radical argument: "No court is bound to enforce unjust law; but to the contrary every court is bound, by prior and superior obligations, to abstain from enforcing such laws."¹⁸¹

The antislavery movement was part of a pervasive moral reformism during the Jacksonian period.¹⁸² The primary source of this moral reformism was evangelical revivalism. For example, in *Elements of Moral Science*, published in 1835, the Reverend Francis Wayland argued that political science was a moral science, based upon God's moral law.¹⁸³ In 1853 Henry Whitney Warner observed that "We are a christian people Our political and civil institutions are all imbued with christianity in a greater or less degree."¹⁸⁴

2. *The Late Nineteenth Century*.—By the late Nineteenth Century the level of antilegalism in America had declined again and became increasingly episodic. Popular images of the Constitution in literature became more uniformly favorable than before the Civil War and indeed now were often reverent.¹⁸⁵ There were still instances of popular justice in the West and South during the late Nineteenth Century,¹⁸⁶ and there was an element of antilegalism in the Populist's broad critique of American society.¹⁸⁷ Enmeshed in the social conflicts that surfaced during the late Nineteenth Century some labor unions¹⁸⁸ and immigrant groups¹⁸⁹

(Mar. 11, 1837).

181. Salmon P. Chase, An Argument for the Defendant Submitted to the Supreme Court of the U.S. in the Case of Jones v. VanZandt (1847). The Court dismissed Chase's argument by resort to a rule of law position in which the judiciary "possess[ed] no authority . . . to modify or overrule" laws of the states. COVER, *supra* note 34, at 174.

182. For example, moral reform was an impulse for the antislavery movement, the feminist movement, temperance, and the building of institutions for criminals, the mentally ill and the poor. See DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).

183. See WRIGHT, *supra* note 53, at 219.

184. MILLER, *supra* note 16, at 67.

185. See KAMMEN, *supra* note 22, ch. 5.

186. See RICHARD MAXWELL BROWN, AMERICAN VIOLENCE 63-66, 99-102, 107-10 (1970); Richard Cole & Gabriel Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 L. & HIST. REV. 325, Part I (1999); see also W.F. BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* chs. 1-5 (1933).

187. Committed Populists deeply critiqued America's emerging capitalism. Though not specifically focused upon the legal system, Populist leaders attempted—unsuccessfully—to develop internal mechanisms that would allow them to operate independently of established social institutions. Populism was a very powerful political force, but for a short time, during the late Nineteenth Century. See generally LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976).

188. See Jonathan Garlock, *The Knights of Labor Courts: A Case Study of Popular Justice*, in *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 17-34 (Richard L. Abel ed., 1982).

189. Chinese immigrants, for example, resolved disputes in their *hui-kuan*. However, they also were litigants in thousands of common law and constitutional law cases. See generally

had internal mechanisms of justice. The deep social conflicts of the late Nineteenth Century are why the contest between William Jennings Bryan and William McKinley in 1896 was so pivotal. McKinley campaigned for a nation ordered by law and his narrow victory represented a triumph of the rule of law.¹⁹⁰

Five years earlier, in 1891, Herman Melville published his remarkable novella, *Billy Budd, Sailor (An Inside Narrative)*,¹⁹¹ which distilled much of the history of the rule of law in Nineteenth Century America. Melville's protagonist, Billy Budd, is an innocent young sailor. When falsely accused of mutiny by the malevolent master-of-arms, John Claggart, he could not speak because of a stutter. In his frustration Budd unleashed a single impulsive blow that unintentionally kills Claggart. The incident occurred in the presence of the ship's captain, Edward Vere, whom Melville used to depict the thinking and method of operation of the classic legalist.

Upon witnessing Claggart's death an agitated Vere exclaimed: "Struck dead by an angel of God. Yet the angel must hang."¹⁹² He decided to charge Budd in a drumbeat court, which meant that the ship's officers would decide his fate.¹⁹³ In his charge before the court Vere acknowledged that natural justice, which he too felt the "full force of," cried out for relief from the strictures of the martial law that mandated Budd's death. But rejecting the biblical example of Abraham and his innocent son, Isaac, Vere did not draw back the knife. Referring again to the clash of head and heart in Nineteenth Century American culture, while recognizing that the "exceptional" nature of Budd's circumstances stirred the sentiments of the heart, Vere nevertheless implored, "let not warm hearts betray heads that should be cool." He reminded his listeners that "the heart denotes the feminine in man," and "hard though it may be, she must here be ruled out."¹⁹⁴ Vere rhetorically asked his listeners: "[D]o these buttons that we wear attest that our allegiance is to Nature? No, to the King." He added: "For the law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly the law may operate, we nevertheless adhere to it and administer it."¹⁹⁵

The place of Melville's classic novella within the framework of Nineteenth Century American history is peculiar. It embodied the most brilliant representation of the clash between natural justice and the rule of law in all of Nineteenth Century American literature. But by 1891 its foundational struggle was the relic of a museum, rended from historical context. Any formidable challenge to the rule of law now came from a very different flank. Its source was

CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994).

190. See GOODWYN, *supra* note 187, at 530-32.

191. HERMAN MELVILLE, *BILLY BUDD AND OTHER TALES* (Willard Thorp ed., 1979) (1891).

192. *Id.* at 60.

193. But Vere has no illusion about who would be responsible for Budd's fate, for he would act as Budd's accuser and have the ability to interpose as needed in the proceeding. See *id.* at 63.

194. *Id.* at 68-69.

195. *Id.*

not popular culture, but the bureaucracy that was administering the emerging body of federal and state administrative law.¹⁹⁶

E. Reconsidering Papke's Heretics

What constitutes heresy is best decided within its historical context. We gain perspective upon Papke's heretics, and the historical development of the rule of law, by reconsidering them within the context of Nineteenth Century antilegalism. As Papke recognizes, William Lloyd Garrison's brand of abolitionism was truly heretical.¹⁹⁷ Garrison and his followers accepted the positivist jurisprudence of judges who upheld the fugitive slave laws. The Constitution was the rule of law. But this led Garrisonians to a stance of moral abstention,¹⁹⁸ and in Garrison's case, to desecrate the Constitution. In a Fourth of July address in 1854 to the Massachusetts Anti-Slavery Society, he proclaimed the Federal Constitutional "an agreement with hell" for violating "the higher law of God" by condoning slavery, and set it aflame.¹⁹⁹ Yet in 1854 his defiant act did not evoke popular outrage. The muted reaction to Garrison's heretical act undoubtedly related to the wide popular sympathy for protest against slavery in a place like Boston by this time. In addition, it would seem to suggest again the vitality of antilegalism in antebellum America and the Constitution was still not yet enshrined in the popular imagination in the 1850s.

Conversely, another of Papke's heretics, Eugene Debs, evoked a very strong reaction in both public sentiment and from government officials during his career as a labor leader.²⁰⁰ As Part III tries to demonstrate, the harsh reaction received by Debs, at least in part, reflects the fact that by the late Nineteenth Century the rule of law in America had become more strict and entrenched than it had ever been in the antebellum period.

Finally, Papke's modern heretics, including the militia and the anti-abortionists, seem ambivalent in their attitude toward the rule of law and have not fully disengaged from the legal faith.²⁰¹ This phenomenon suggests that time has

196. See LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 37-116 (1995); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

197. PAPKE, *supra* note 4, at 24-50.

198. In his book, *The Constitution: A Pro-Slavery Compact*, Wendell Phillips included a letter of resignation by Francis Jackson, a justice of the peace in Massachusetts:

The oath to support the Constitution of the United States is a solemn promise to do that which is a violation of the natural rights of man, and a sin in the sight of God. . . . I withdraw all profession of allegiance to it [the Constitution], and all my voluntary efforts to sustain it.

COVER, *supra* note 34, at 153-54 (quoting WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* 171-81 (3d ed. 1856)) (alteration in original).

199. See PAPKE, *supra* note 4, at 25.

200. *Id.* at 76-105.

201. For example, militia ideology devotes extended attention to interpretations of the Second

ingrained popular faith in the rule of law. The depth of the popular legal faith during the Twentieth Century may provide another reason why historical antilegalism has received so little attention from legal historians. It is very hard, even for professional historians, to break free from viewing the past from the perspective of their own age.

III. RECONSIDERING THE RISE OF THE RULE OF LAW

In 1829, at the dawn of the Jacksonian era, Joseph Story delivered his inaugural address as the Dane Professor of Law at Harvard.²⁰² Earlier that year a paper by Jefferson rejecting the view that the common law embodied Christian values, though written in 1764, had just been published. Story begins by attacking Jefferson's "specious" conclusion, insisting that: "One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the Common Law" Story supported his assertion on a number of grounds, including that "[f]or many ages [common law] was almost exclusively administered by those, who held its ecclesiastical dignities."²⁰³

Story also believed that law was a science, akin to the natural sciences.²⁰⁴ It represented a storehouse of accumulated legal principles: "The gathered wisdom of a thousand years."²⁰⁵ Like science, then, "every successive age brings its own additions to the general mass of antecedent principles."²⁰⁶ Although law was founded in "natural reason," it was also a flexible science "adapted and moulded to the artificial structure of society."²⁰⁷ The enormous

and Fourteenth Amendments. New militia members must swear allegiance to the Constitution. *See id.* at 140-42. *Closed: 99 Ways to Stop Abortion*, a manual of anti-abortion tactics, begins with the proclamation that: "Pro-life activists . . . cannot wait for legislative and judicial process that will make abortion illegal. The activist must save lives now." But on the following page it suggests that those who have questions about the legality of the methods discussed in the manual to consult a lawyer. *See id.* at 148 (quoting JOSEPH M. SCHEIDLER, *CLOSED: 99 WAYS TO STOP ABORTION* (Tan Books & Publ. rev. ed. 1993) (1985)).

202. JOSEPH STORY, DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY (Aug. 25, 1829), *reprinted in* THE LEGAL MIND IN AMERICA, *supra* note 87, at 177.

203. *Id.* at 178. Other evidences of its basis in religious values was that common law refused to enforce contracts offensive to its morals; it recognized religious holidays; and it gave its greatest trust to witnesses who swore their belief in divine authority. For Story the fault of the common law was that it too narrowly defined religious orthodoxy, and persecuted conscientious heretics. *Id.* at 178-79.

204. *Id.* at 184. White wrote: "Science provided the metaphor through which the nature of American law and the role of the legal profession could be recast." White, *supra* note 132, at 155.

205. STORY, *supra* note 202, at 183 (quoting JOHN SHORE TEIGNMOUTH, MEMOIRS OF THE LIFE, WRITINGS, AND CORRESPONDENCE OF SIR WILLIAM JONES 100 (London, John Hatchard 1804)).

206. *Id.* at 184.

207. *Id.* at 183.

changes in contemporary society generated by "commerce, agriculture, and manufactures, and other efforts of human ingenuity and enterprise[,] required the clearing out of "old channels," while adding "new increments and deposits."²⁰⁸ Story further observed that the moral and scientific character of law justified the broad and arduous study of all the major branches of human learning needed to become a perfected lawyer.²⁰⁹

Casting the study of law as both a moral and scientific enterprise provided a basis for Story's noble view of the legal profession. In contrast to "the sneers of ignorance, and the gibes of wit,"²¹⁰ the result of a genuine immersion in the study of law was a learned, virtuous and disinterested citizen. Story believed that "no men are so constantly called upon in their practice to exemplify the duties of good faith, incorruptible virtue, and chivalric honor, as lawyers."²¹¹ Recalling the image of the lawyer as stirring up lawsuits and fomenting discord within the community, Story disclaimed that "any man, standing in the temple and in the presence of the law, should imagine that her ministers are called to such unworthy offices. No. The profession has far higher aims and nobler purposes."²¹²

Story's claim for the high purpose of the legal profession was related to his conviction that no less than "the welfare of the whole community" depended upon "the actual administration of justice in all governments, and especially in free governments."²¹³ The major basis for this claim was the view that America's rule of law stood as a buffer to the threat posed by the passions of excessive democracy to the survival of its free community.²¹⁴ The law restrained the passions of democracy by jealously protecting rights of property, without which "all other rights become worthless or visionary."²¹⁵ Story also viewed the Constitution as the "great bond and bulwark of the Union,"²¹⁶ and believed that a strong federal government and judiciary were absolutely necessary to maintaining a rule of law in a democracy.²¹⁷ Story, then, believed that the lawyer

208. *Id.* at 184.

209. *Id.* at 184-89.

210. *Id.* at 179.

211. *Id.*

212. *Id.* at 181.

213. *Id.*

214. *Id.* See also Joseph Story, Address Delivered Before the Members of the Suffolk Bar, Boston (Sept. 4, 1821), in *THE LEGAL MIND IN AMERICA*, *supra* note 87, at 67, 71-73.

215. STORY, *supra* note 202, at 180. Story asked his audience: "What is the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to ratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporary popularity." *Id.*

216. Story, *supra* note 214, at 74.

217. Story stated this view in his address delivered to the Suffolk County Bar: "If the union of the states is to be preserved . . . it can only be by sustaining the powers of the National Government in their full vigor, and holding the judicial jurisdiction . . . co-extensive with the legislative authority." *Id.* at 75.

"stands alone, to maintain the supremacy of law against power, and numbers, and public applause, and private wealth."²¹⁸ Like "a public sentinel," the lawyer was placed "upon the outpost of defense . . . to watch the approach of danger, and to sound the alarm, when oppression is at hand."²¹⁹

Story's address embodied the main arguments made by the new nation's legal elite for the legitimization of the rule of law in the new American republic. A contemporary of Story, James Kent, who like Story was a judge, legal educator and commentator, declared that law was a "moral science." It therefore enjoyed the sanction of traditional religious authority and the prestige of science in a culture whose development was vitally linked to advances in applied sciences.²²⁰ While by the late Nineteenth Century claiming the authority of both religion and science would be problematic, how did legal thinkers earlier in the century make such a broad claim of authority for law?

Critical to the assertion that law was a moral science was the view that law was a discipline of reason. This conclusion seemed readily apparent to a generation of lawyers weaned on Blackstone, who not only associated common law with natural reason,²²¹ but whose *Commentaries* represented a gigantic effort to order this body of law. According to Jesse Root, common law was "the perfection of reason." He could have said the same of constitutional law, for many of Root's contemporaries considered John Marshall to be the paragon of legal reasoning.²²²

The intellectual methodology of this early legal elite also represented the application of reason, creating general principles of law. Critical to the work of the new nation's lawyers was the task of arranging and systematizing law. The leading legal educator David Hoffman is illustrative. He believed that, even more than other sciences, it was important "to methodize and arrange" law "as she enlarges her acquisitions."²²³ In a memorable passage Kent lauded the work of the "learned [Hugo] Grotius. He found the law of nations . . . in a frightful chaos." But he recovered "it from the darkness of feudal barbarism" by digesting public law "into one systematic code."²²⁴ The systematic arrangement of law ultimately led to the elaboration of universal principles of law. The great legal

218. STORY, *supra* note 202, at 181.

219. *Id.* Story also evoked the image of the lawyer as martyr, sacrificing himself to save the polity. *Id.* at 181-82.

220. JAMES KENT, A LECTURE, INTRODUCTORY TO A COURSE OF LAW LECTURES IN COLUMBIA COLLEGE (Feb. 2, 1824), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 95, 95-96.

221. See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VILL. L. REV. 1387, 1395 (1997).

222. For example, Horace Binney believed Marshall was a master of the lawyer's ability "to compare, discriminate, adopt, reject." MILLER, *supra* note 16, at 118, 120. Story celebrated the structure of Marshall's reasoning: "[O]nce admit his premises and you are forced to his conclusions." *Id.* at 120.

223. DAVID HOFFMAN, A LECTURE, INTRODUCTORY TO A COURSE OF LECTURES, UNIVERSITY OF MARYLAND (1823), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 84, 90, 87-91.

224. KENT, *supra* note 220, at 100-01.

treatises of the period, like Kent's *Commentaries* and Story's many legal treatises, were efforts to organize the law of the American states around uniform legal principles.²²⁵ All the legal writers of the early republic sought to synthesize a wide variety of historical sources of law, including Roman and civilian law, ecclesiastical law and international law, providing another reason for the breadth of a proper legal education during this period.²²⁶ As Daniel Coquillette observed about the writing of John Adams, a cosmopolitan knowledge of law "encouraged a provincial lawyer to dare to think 'big,' to aspire to have universally valid ideas."²²⁷

The arrangement of law leading to the formulation of general legal principles was also a moral effort. As St. George Tucker observed: "[T]he *cultivated reason* of mankind" was the best guide to moral correctness.²²⁸ Kent believed that the works of Grotius, along with other works organizing international law, lay an essential foundation for the peace and morality of modern European civilization.²²⁹ Kent was also certain that: "The sure and certain consequence of a well-digested course of juridical instruction, will be to give elevation and dignity to the character of the profession."²³⁰ Rufus Choate pictured judges, in contrast to the age-old allegation that the legal profession represented the interests of the wealthy and powerful, as disinterested administrators of a moral and just law.²³¹

An important source for the claim that law, as a discipline of reason, was a moral science was moderate Enlightenment thought, and especially Isaac Newton's belief that science and religion were harmonious. For example, in a Newtonian vein Hoffman claimed that every law, even one local and temporary, had "foundations in the universal laws of our moral nature," and that the moral ordering of law demonstrated the divine "harmony of the world."²³²

There was another important basis for claiming that law was a moral science. Post-revolutionary lawmakers consciously sought to shape law so that it would be suitable to, and indeed contribute to the development of, a new American community. The initial basis for this approach to lawmaking was the recognition

225. See White, *supra* note 132, at 96-99.

226. See *id.* at 87, 99-100.

227. Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, in COLONIAL SOCIETY OF MASSACHUSETTS, *LAW IN COLONIAL MASSACHUSETTS, 1630-1800*, at 359, 416-18, (Daniel R. Coquillette, ed., 1984).

228. MILLER, *supra* note 16, at 118 (emphasis in original). Miller also cited Judge Johnson for this proposition. *Id.* at 120.

229. See KENT, *supra* note 220, at 100-02; THE LEGAL MIND IN AMERICA, *supra* note 87, at 94.

230. KENT, *supra* note 220, at 98. See also MILLER, *supra* note 16, at 118.

231. RUFUS CHOATE, THE POSITION AND FUNCTIONS OF THE AMERICAN BAR, AS AN ELEMENT OF CONSERVATISM IN THE STATE: AN ADDRESS DELIVERED BEFORE THE LAW SCHOOL IN CAMBRIDGE (July 3, 1845), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 260, 270-71.

232. HOFFMAN, *supra* note 223, at 90, 87-91.

that old English legal precedents needed to be altered to render them suitable to the circumstances of the new nation. In his *Sketches of the Principle of Government*, written in 1793, Nathaniel Chipman identified the reshaping of established law to a new American polity as the essential challenge to the genius of the American lawyer.²³³ According to Story, a characteristic of legal science was the ability of the science of law, both old and new, to adapt to the conditions of their fast-changing society. Much of the lawmaking of the new nation consciously sought to foster the development of the American economy. The instrumentalism of this lawmaking paralleled the utilitarian view of applied science popular in Nineteenth Century America.²³⁴

By any measure the intellectual framework constructed by early America's legal elite justifying the rule of law, as well as its output of legal literature in accordance with it, was most impressive. That it provided an ideology for the new nation's legal professionals who used it to parry antilegalist alternatives to the emerging rule of law, is undeniable. But did its force establish popular faith in the rule of law? Although its claim of authority from both science and religion was a powerful one, this seems unlikely, at least acting alone, for a number of reasons. Undoubtably of least importance was that all of these diverse ideas of the legal elite's claim that law was a moral science, nobly serving the community's highest interests, were not easy to bring together into a coherent body of thought, or to render consistent with a stable rule of law.²³⁵ More importantly, several factors reduced the influence of the new legal ideology in antebellum popular culture. First, as Perry Miller recognized, the legal elite's association of law with reason ran up against the rising tide of evangelicalism emphasizing the importance of sentiment in human experience.²³⁶ It wanted more than a historical assertion of connections between law and Christianity. Further, evangelicalism was closely connected to a rising swell of popular democracy during the antebellum period that, as Story's Inaugural made clear, the legal elite

233. NATHAN CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* (Rutland, 1793), reprinted in *THE LEGAL MIND IN AMERICA*, *supra* note 87, at 21, 29-30. A recurring theme of St. George Tucker's edition of Blackstone's *Commentaries* was the need to adapt English law to the spirit of America's republican government; to the circumstances of the varied jurisdictions of American federalism; and to the many changes in the system of property, penology, and other forms of American society. See White, *supra* note 132, at 83-84.

234. See MILLER, *supra* note 16, bk. 3, ch. 1, §§ 4-5. There is an enormous and important body of legal history that emphasizes the role of law in fostering the economic growth of Nineteenth Century America. See, e.g., *supra* note 2.

235. The process of "Americanizing" old law, of instrumentally shaping it to foster the development of American economy and society, entailed a potentially disordering process of legal change that would unsettle established precedents and potentially undermine a strict rule of law. Could the utilitarian spirit of an instrumental law be rendered consistent with a morally elevated view of law, even if both were rooted in the exercise of reason? Hoffman expressed the wish that American lawmaking would allow law, during "many revolutions of manners," to retain "its form, while it has altered its spirit." HOFFMAN, *supra* note 223, at 89.

236. MILLER, *supra* note 16, at 186-88, 193.

was trying to restrain. Related to the rising democratic sentiment was that the neoclassical culture of law and letters that had nurtured the outburst of legal thought collapsed. Finally, Part II of this Essay suggests that popular antilegalism persisted well into the Nineteenth Century. We should not discount the popularity of Cooper's simple and pure-hearted hero, Natty Bumppo whose support for natural justice had wide appeal to Jacksonian Americans.

Further, by this period the legal elite perceived at least two imposing threats to the rule of law. One was the spreading web of commercial transactions. At least by the 1840s and perhaps earlier, historians have discerned the existence of a popular legal ideology of free market exchange. There exist very different historical accounts of the formation and significance of the new legal ideology. James Willard Hurst's monumental studies of Wisconsin law suggest that law adopted its basic premises, the most important being the release of energy of individuals, from the general culture of the community. The sources of these ideas could be traced to the emergence of classical political economy, whose most influential proponent was Adam Smith's *The Wealth of Nations*,²³⁷ as well as further back to the Enlightenment, the Reformation and the Renaissance. Hurst pictured a wide popular acceptance of the law's positive role in fostering free market enterprise.²³⁸ In contrast, Jay Feinman and Peter Gable argue that law itself was critical to the creation of the free market ideology. They suggest that law was one of a number of powerful tools in gaining popular acquiescence to an economic system that unfairly favored accumulations of wealth by the rich and powerful.²³⁹

What is important to appreciate for a study of the emergence of faith in the Nineteenth Century rule of law is the major divergence between the popular legal ideology of the free market and that of America's legal elite. At most they coincided only partially in a shared support of economic instrumentalism. But not even this is historically accurate, for the legal elite feared that the frenetic commercialism of the Nineteenth Century would destroy a community ordered by a rule of law. The legal elite did, of course, help to create law that supported the economic growth of the new nation. But rather than supporting the pell-mell rush of the free market, it sought to establish a stable rule of law that would facilitate commercial development within an ordered community.

Story's case opinions and scholarship provide an excellent example of such lawmaking. In *Swift v. Tyson*,²⁴⁰ in the context of a decision that fostered the free circulation of commercial paper, he finally established the doctrine of a federal

237. ADAM SMITH, *WEALTH OF NATIONS* (2d ed. 1937).

238. Paraphrasing Jefferson, Hurst wrote: "We were all Republicans, we were all Federalists, in possessing a common instrumental belief which shaped the nineteenth-century legal order." JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 33 (1956). See generally *id.*, ch. I.

239. "The law is one of many vehicles for the development and transmission of ideological imagery." Jay Feinman & Peter Gable, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 373, 374 (David Kairys ed., 1990).

240. 41 U.S. (16 Pet.) 1 (1842).

commercial law. Story also wrote a treatise on commercial paper that sought to reconcile varying state laws in a more uniform law of commercial paper.²⁴¹

The goal of restraining economic development within the framework of the a stable rule of law is also represented by the lawmaking of the young Lewis Cass, while he was governor of the Michigan Territory. He was a highly educated lawyer who chose a political career that culminated in an unsuccessful candidacy for the presidency of the United States. In an address Cass delivered to the alumni of Hamilton College in 1830 he recognized "important changes, affecting the whole system of society, whose advance is no less certain, salutary, or irresistible."²⁴² Critical to the changes was applied science, most especially the development of steam power. But Cass also feared "the trading mart of Detroit" and the individual selfishness it unleashed.²⁴³ Instead, he favored the economy of moderate yeoman farmers. While recognizing the need to adapt law to changes in society and economy, Cass warned against upsetting "the great principles, which protect the rights of persons and property in our country, [and] are too firmly established and too well understood to require or even to admit frequent or essential alternation."²⁴⁴

Meanwhile, during the decades preceding the outbreak of the Civil War abolitionists were increasing their attacks upon the Federal Constitution. The incendiary demand of Garrison and others for the immediate abolition of slavery seemed to threaten the survival of the American nation itself. As the federal judiciary adamantly resisted antislavery legal advocacy, popular sentiment outside of the South became restive with the rule of law. By the 1850s, events like the Kansas-Nebraska controversy and John Brown's raid, as well as desperate lawmaking like the passage of a strengthened Fugitive Slave Law and the *Dred Scott* decision, demonstrate that the damage done to the rule of law was serious. The Civil War, replacing the rule of law with military power, would soon follow.²⁴⁵

The cumulative impact of these two threats to the rule of law suggest again why members of the early republic's legal elite, as they grew old, became pessimistic about the impact of their work.²⁴⁶ There were, however, two forces during the antebellum period that were working to foster popular faith in the rule of law. The first of these circumstances was economic and sociological change, most especially the expanding tentacles of the market economy in Nineteenth Century America. Again Cooper is a helpful commentator upon American society. In his *Notions of the Americans: Picked Up By a Travelling*

241. JOSEPH STORY, COMMENTARIES ON THE LAW OF PROMISSORY NOTES (1845).

242. *Law and Community*, *supra* note 18, at 236. See generally Konefsky, *supra* note 34 (discussing the attitudes of lawyers, as well as of merchants and men of literature, toward a commercialized economy in antebellum Boston).

243. *Law and Community*, *supra* note 18, at 246-47.

244. *Id.* at 236.

245. See DAVID DONALD, AN EXCESS OF DEMOCRACY: THE AMERICAN CIVIL WAR AND SOCIAL PROCESS 21-22 (1960).

246. See *supra* note 173 and accompanying text.

Bachelor,²⁴⁷ Cooper emphasized three important material changes occurring in American life at the dawn of the Jacksonian era. One was a rapid growth and diffusion of American population. By 1840 America's population had grown to 17.1 million persons, about one-third of whom lived west of the Appalachian Mountains. Cooper estimated that by 1920 America's population would be 100 million persons, a prediction that would prove too conservative.²⁴⁸ Had Cooper written his book even a decade later he might also have emphasized the growing diversity of the American people. During the antebellum generation a large immigration from northern Europe began, and during the last generation of the century large numbers of immigrants from eastern and southern Europe would settle in America.

Cooper attributed the diffusion of America's population to what later historians would call the "transportation revolution." It had three phases, beginning with the building of roads, called turnpikes. Its second phase was the building of canals, including the completion of the Erie Canal connecting New York to the Great Lakes waterway system in 1825. The third phase was the building of railroads, which by the 1840s was proceeding at a rapid pace in the North and Midwest. Scientific advances in steam power, embodied in the steamboat and locomotive, underlay the last two phases of the transportation revolution.²⁴⁹

The mechanization of transportation, as well as of many facets of the processes of production in both agriculture and manufacture, was critical to the dramatic development of "commerce" in Nineteenth Century America. The major changes that Cooper identified were its rapidly rising volume and its increasingly internal character. There was developing in America an economy of complementary regional markets. The Northeast was becoming the financial, manufacturing and shipping center of the nation's economy; the South remained an economy of agriculture for primarily international markets; and the West was in the process of becoming the leading producer of foodstuffs in the world. Although older forms of social relations and economy persisted,²⁵⁰ during the half-century from 1790 to 1840 there occurred a massive commercialization of the American economy that, as each decade passed, was affecting the lives of

247. JAMES FENIMORE COOPER, *NOTIONS OF THE AMERICANS: PICKED UP BY A TRAVELLING BACHELOR* (Ungar 1963) (1828).

248. See White, *supra* note 132, at 12-15.

249. GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815-1960* chs. II-V (1951).

250. This point is very well made by White. He wrote: "Geographic diversity, provincialism and stratification coexisted in early nineteenth-century America with the turnpike, the canal, the steamboat, and the infant railroad." White, *supra* note 132, at 20-21. He emphasized continuities in the economy of the Nineteenth Century South. Though the "interaction of slave labor and technological developments," namely the cotton gin, was new in the Nineteenth Century, "both slavery and an externally oriented traffic in agricultural commodities had been fixtures of the eighteenth century." *Id.* at 23.

increasing numbers of Americans.²⁵¹

The cumulative effect of these changes was to undermine institutions of popular justice. What had happened during the Eighteenth Century repeated itself a century later, and now even more widely and irrevocably. As America's population became more pluralistic, and the web of commercial exchange widened and became regional, and as middlemen like railroads and wholesaling companies became involved in this process of exchange, local institutions of justice could presumably no longer resolve commercial disputes arising among such diverse and far-flung parties. Jacksonians were living in a period of monumental changes, and this was one of them.²⁵² In order for increasing numbers of Americans to engage in market exchange, they needed a framework of law to define when commercial transactions were enforceable and the consequences of these agreements.²⁵³ It was in this way that large numbers of Americans initially became accustomed to the rule of law.

The other force of this period encouraging popular acceptance of the rule of law was the work of America's last great lawyer bred in the neoclassical culture of law and letters, Abraham Lincoln. Lincoln's neoclassical lineage is unmistakable. The works that most influenced him were the *Bible*, Blackstone and Shakespeare. He recoiled from Stephen Douglas' resolution to the slavery controversy, seeing it instead as a matter of principle, not popular will. Lincoln unreservedly embraced the rule of law, but unlike the old legal elite, his attachment to it was founded upon a faith almost mystical in nature, not reason.²⁵⁴

In dealing with the slavery controversy, Lincoln sought to synthesize the rule of law and the demand of evangelicals that law reflect moral values. Unlike abolitionists, he insisted that adherence to the rule of law, even to unjust decisions like *Dred Scott*, was the best course.²⁵⁵ But like evangelicals of his era,

251. See DOUGLASS NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES, 1790-1860* chs. VII-IX (1966).

252. See *id.*; PESSEN, *supra* note 171, ch. 1.

253. See HURST, *supra* note 238, ch. II.

254. This is suggested by Lincoln's reverence for the Declaration of Independence as the primary, and the Federal Constitution its secondary, linchpins of American constitutional law. See FERGUSON, *supra* note 14, at 308-14.

255. In his first inaugural address, Lincoln stated:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to the particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.

ABRAHAM LINCOLN, *FIRST INAUGURAL ADDRESS* (Mar. 4, 1861), reprinted in *MESSAGES AND PAPERS OF THE PRESIDENTS* 5, 9-10 (James D. Richardson ed., 1897). In 1856 Lincoln urged an audience at Kalamazoo, Michigan not to "interfere with anything in the Constitution. . . . [I]t is the

Lincoln wanted more than assertions of historical connections between law and morality. In a sustained way he wished to infuse law with current moral sentiment, including a moral condemnation of slavery. Like Cooper, for example, he contemplated an amendment to the Constitution recognizing God within the polity. A synthesis of a rule of law and morality provided the basis for Lincoln's famous call for a political religion in 1838:

To the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor Let reverence for the laws, be breathed by every American mother Let it be taught in schools, in seminaries, and in colleges . . . let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation.²⁵⁶

The impact of Lincoln's undeviating advocacy for a constitutional rule of law upon pre-Civil War popular culture remains uncertain. It would require patience, and a terrible bloodletting, but Lincoln finally got what he wanted, both the preservation of the union and the abolition of slavery. It is possible to conclude that Lincoln's thinking finally prevailed during the late Nineteenth Century and provided a critical basis for the popular reverence of the Federal Constitution of that period. The Civil War had also weakened the American tradition of localistic lawmaking. Postwar law, most especially the Fourteenth Amendment, began to reshape American Federalism. While the attachment to localism remained vital throughout the late Nineteenth Century, and the full impact of the Fourteenth Amendment would only be felt in the Twentieth Century, during the generation after the Civil War the beginnings of a transfer of lawmaking power to the national government are unmistakable.²⁵⁷

During the late Nineteenth Century a new legal elite worked assiduously to establish what would become known as classical legal thought, a more strict and formalistic form of judicial lawmaking. The postwar legal elite continued to view law as a science. The leading legal educator of the era, Christopher Columbus Langdell, appointed Dean of the Harvard Law School in 1870, compared it to geometry. This analogy, as well as the view that lawmaking should be strictly separated from political influences, suggested an internal process of reasoning in its elaboration of legal doctrine that was alternatively inductive and deductive.²⁵⁸ The result of this process was the conceptualization of abstract and objective general principles of law. In contrast to prewar law, these general legal principles applied without regard to the status of the parties involved in a case, or the particular transaction entered into by them. Good

only safeguard of our liberties." KAMMEN, *supra* note 22, at 102.

256. 1 ABRAHAM LINCOLN THE COLLECTED WORKS OF ABRAHAM LINCOLN 112 (Roy P. Basler ed., 1953).

257. See NELSON, *supra* note 170, ch. VII.

258. See Thomas C. Grey, *Landell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13, 16-20, 6 (1983); M. H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 96 (1986).

examples of the new law were the conceptualization of the negligence principle to replace the more specific legal duties of earlier law, and the development of a general law of contract formation applicable to all sorts of agreements. Indeed, it is in this period that the law of tort and contract, as modern law now conceives of them, formed.²⁵⁹ By the end of the century Oliver Wendell Holmes had articulated a positivist jurisprudence that radically separated morality from lawmaking.²⁶⁰

Had classicism of the late Nineteenth Century legal elite finally popularized the rule of law? Again, this appears to be unlikely. Recent literature suggests that the rise of classical legal thought constituted part of a "search for order" in late Nineteenth Century America. The conceptualization of generalized legal principles like negligence constituted a reordering of legal thought required by the collapse of the common law's traditional mechanism for ordering law, its system of writs. This was an ordering specifically useful to the profession. More generally, under the pressures of Darwinian evolution and radical changes in society and economy, religion was losing influence as a source of ordering of culture. Victorian thinkers sought new mechanisms to reorder the world, and in late Nineteenth Century America, law became one of these devices. Law offered a utopian vision of a rational and neatly ordered world. But it was a rather cold and disengaged one,²⁶¹ having its greatest appeal to the late Nineteenth Century legal elite, and perhaps America's emerging professional class. The new jurisprudence's impact upon popular culture remains problematic. For example, it seems quite likely that popular culture maintained a greater adherence to traditional religion as a source of authority than did educated professionals like lawyers.

By the late Nineteenth Century, however, the expansion of the market economy had further transformed American life. That it had made law an unavoidable aspect of modern life was persuasively argued by the writing during this period of the great German legal scholar, Max Weber. The American economy had become thoroughly industrialized and increasingly enmeshed in exchange in international markets.²⁶² In this context the new law of contract was of particular importance. According to Weber, the modern market economy "could certainly not exist without a legal order The tempo of modern business communications requires a promptly and predictably functioning legal system . . . guaranteed by the strongest coercive power."²⁶³ Weber's view of the indispensability of the rule of law to the modern market suggests why antilegalism by the late Nineteenth Century had become a lost cause.

259. See GRANT GILMORE, *THE DEATH OF CONTRACT* 13-14 (1974); *CRISIS OF LEGAL ORTHODOXY*, *supra* note 2, ch. I.

260. See OLIVER WENDELL HOLMES, *THE PATH OF THE LAW*, 10 HARV. L. REV. 457 (1897), reprinted in part in *AMERICAN LEGAL REALISM* 15-24 (William W. Fisher, III et al. eds., 1993).

261. See Grey, *supra* note 258, at 39-40, 53; White, *supra* note 132, at 4-12.

262. See ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* ch. 1 (1967).

263. MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 39-40 (Max Rheinstein ed., 1967).

To the extent that the market was the basis for popular acceptance of the rule of law, Americans did not embrace it, but rather acceded to it as a necessity of modern life. In contrast, by this period popular culture positively embraced the Federal Constitution. Although this Essay suggests a basis for the different views of common and constitutional law in the late Nineteenth Century popular culture, this point deserves further study that lies beyond its scope. There is still much to learn about how popular legal faith in the rule of law became a central feature of American legal culture.

IV. LOOKING BEYOND *HERETICS*

The intrinsic merits of Papke's study of legal heretics are great. But undoubtedly its greatest contribution to scholarship is the valuable perspectives that it provides for continuing to study the rise of the rule of law, and the deep popular faith in it, in American history. Legal historians must begin their study of this important subject of American legal history with traditional sources, internal and elite legal texts. There is still much useful debate occurring concerning the significance of these legal texts.²⁶⁴ But Papke urges us to move beyond traditional sources to explore the new perspectives he incorporates into his study. We must be concerned with losers who supported popular justice as well as winners who supported the rule of law; with popular as well as elite culture; and with law as it relates to other institutions of culture, including religion. Considering such questions will entail the use of not only the traditional sources of intellectual history, but also sources of sociological history.²⁶⁵ Writing a richly contextual history of the rule of law is daunting. Study of the diverse sources for such a history will be arduous. Further, the sources for the history of popular culture, and for reconstructing sociology, will be incomplete. But however challenging it is to explore the perspectives suggested by David Papke, pursuing them will deepen our understanding of the rule of law, and why it is that Americans are imbued with a deep legal faith.

264. See Feldman, *supra* note 221.

265. What I am suggesting is similar to what Professor Gabriel Chin and myself suggested for the future study of the contributions of diverse cultures to American law in Cole & Chin, *supra* note 186, Part IV.

NOTES

THE MANAGED CARE PLAN ACCOUNTABILITY ACT

HEATHER HUTCHINSON*

INTRODUCTION

Joy and anticipation overwhelmed Florence as she awaited the birth of her second child. She took comfort in the fact that her employer provided health insurance. Florence thought that if complications arose, as they did in her first pregnancy, she would have the best medical care. Florence's physician first recommended complete bed rest and then hospitalization to monitor the fetus. However, an administrator with Florence's health plan denied coverage for the recommended treatment and instead provided ten hours per day of in-home care as a less costly alternative. While Florence was home alone, during a period when the nurse was off duty, the fetus went into distress and died.

Distraught, Florence and her husband sued Florence's health plan, alleging that the child died because the plan would not authorize the hospital stay where the fetus could be monitored. Although the court agreed that the plan had engaged in a medical determination, it found that Florence had no claim because federal law did not provide for a cause of action against the health care provider.¹

Situations similar to Florence's have become all too common in this age of managed care. As health care costs rise, more employers enroll in managed care organizations ("MCOs") to meet the growing need for lower health insurance cost. As a result of the mechanics used by MCOs to control costs, health decisions are no longer made only by physicians. Often, when MCO administrators determine that treatment or testing is not necessary or covered under the MCO's health insurance plan, patients have little recourse against the MCO. Under current federal law, if an MCO denies an operation that could prevent a patient enrolled in a self-funded employer plan from going blind, and the patient subsequently goes blind, the MCO patient may only recover the cost of the operation that was previously denied.² The patient cannot sue for other

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1. Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1331 (5th Cir. 1992).

2. See Christine V. Bator, *Liability Issues in Managed Care—Who Should Bear the Risk of Loss*, 1995 NAT'L HEALTH L. ASS'N MANAGED CARE INST. 14.

damages resulting from the blindness itself.³ This seemingly unfair result is because most actions against MCOs are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), leaving harmed individuals with limited recourse.⁴ Congress has raised viable solutions to this dilemma, such as the Managed Care Plan Accountability Act ("MCPAA") and others addressed in this Note, but has ultimately failed to pass such legislation. The MCPAA would create a federal right of action for individuals harmed by cost containment measures used by MCOs, allowing individuals to collect actual, consequential, and punitive damages.⁵

Part I of this Note discusses the emergence of managed care, why managed care has become so prevalent, and how managed care works. Part II examines the theories of managed care liability, including defenses raised by MCOs to avoid liability. Part III discusses ERISA preemption and its current application in today's legal environment. Part IV describes national reaction to managed care. Part V presents the MCPAA, explains how it could alleviate many of the current problems with MCOs, details legislative action, and explains why the MCPAA is an effective solution. Finally, Part VI introduces other managed care reform proposals that came before Congress in 1997.

I. THE EMERGENCE OF MANAGED CARE

Managed care developed during the late 1980s, when runaway inflation focused attention on the high cost of medicine and concerns over physicians overtreating patients for profit.⁶ Until the 1980s, under the traditional fee-for-service model, insurance would pay for virtually any physician the patient selected. The physician provided care for the patient and the patient's insurance company compensated the physician according to the physician's standard fee.⁷ In contrast, MCOs contract with employers who seek ways to reduce the cost of providing health care benefits to their employees.⁸ MCOs use a variety of techniques to accomplish this cost reduction, usually restructuring the manner in which physicians are paid and how they administer care.⁹

3. See *id.*

4. ERISA broadly states that federal law supersedes any and all state laws that relate to any employee benefit plan. 29 U.S.C. § 1144(a) (1994) ("The provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.").

5. See *infra* notes 159-64 and accompanying text.

6. See Jason Mark, *HMO Liability: Medical Decisions Made in the Corporate Boardroom*, MASS. LAW. WKLY., June 30, 1997, at B25.

7. See Laura H. Harshbarger, Note, *ERISA Preemption Meets the Age of Managed Care: Toward a Comprehensive Social Policy*, 47 SYRACUSE L. REV. 191, 194 (1996).

8. See Erik Larson, *The Soul of an HMO: Managed Care Is Certainly Bringing Down America's Medical Cost, But It Is Also Raising the Question of Whether Patients, Especially Those with Severe Illnesses, Can Still Trust Their Doctors*, TIME, Jan. 22, 1996, at 44.

9. See Gregg Easterbrook, *Healing the Great Divide: How Come Doctors and Patients*

Managed care is experiencing widespread growth; an escalating number of Americans are affected by MCOs and their administration of health care. Today, over forty-five million Americans are enrolled in MCOs and ERISA governs the majority of those plans.¹⁰ Managed care health plans cover more than seventy percent of American workers and their families.¹¹ As health care costs continue to rise, more employers will likely choose MCOs to lower the cost of providing health care benefits to their employees. As more individuals receive their health care through employer-sponsored health benefit plans, more physicians will be forced to contract with managed care plans.¹² Because of the techniques managed care companies use to reduce health costs, physicians' treatment decisions are arguably affected by MCO's administrative choices.¹³ Managed care is different from traditional medical delivery services. Therefore, it needs new and innovative regulation to keep its development within the confines of responsible and responsive medical practices.

A. How Managed Care Works

Early MCOs employed physicians, however, most MCOs today simply contract with physicians who then act as independent contractors.¹⁴ In theory, the MCO serves only to administer the benefits and does not control the physician's delivery of care to the patient. Although physicians are often reluctant to enter into contracts with MCOs, as an increasing number of large employers in the physician's geographical area receive their health care benefits through an MCO, many physicians contract with MCOs for fear that their patient population will shift to another physician who contracts with the MCO.¹⁵ Most MCOs list contracted physicians as preferred providers. Preferred providers agree to a reduced fee in return for an increased volume of patients from area employers. As a disincentive to see non-contracted physicians, if a patient chooses to see a physician not listed in the MCO's preferred provider directory, the patient's care might not be covered or the patient may be asked to pay a larger copayment or deductible. This causes many patients to see only those physicians who have contracted with the MCO. In a geographic area where many large employers contract with MCOs, physicians who refuse to contract with MCOs may find their patient population significantly reduced. Physicians, though initially reluctant to contract with MCOs, now must contract with MCOs to maintain their

End Up on Opposite Sides?, U.S. NEWS & WORLD REP., Oct. 13, 1997, at 64.

10. See Harshbarger, *supra* note 7, at 192.

11. See William Carlsen, *Bill Would Let Patients Sue HMOs for Denial of Services*, S.F. CHRON., May 23, 1997, at A4.

12. See James F. Henry, Comment, *Liability of Managed Care Organizations After Dukes v. U.S. Healthcare: An Elemental Analysis*, 27 CUMB. L. REV. 681, 684 (1996-1997).

13. See Barry R. Furrow, *Managed Care Organizations and Patient Injury: Rethinking Liability*, 31 GA. L. REV. 419, 423-26 (1997).

14. See *id.* at 422-23.

15. See *id.*

patient base.¹⁶

Despite the MCO's arguable success in reducing health care costs for employers, increasing access to care for employees, and providing a large pool of patients for some physicians, physicians and patients are often frustrated with MCOs.¹⁷ Their frustration stems from the two techniques central to managed care: utilization review and discounted or capitated physician fees.

B. Utilization Review

Utilization review is "a prospective or concurrent determination of whether the requested procedure is medically necessary and appropriate."¹⁸ Under an MCO's utilization review procedure, if a physician recommends a certain test or treatment, the physician's office often has to call a toll-free telephone number to get permission from the MCO to order the test or perform the treatment. The MCO representative then decides both whether the recommended treatment or testing is "medically necessary" in accordance with the plan and whether it is a covered service under the agreement with the patient. These MCO representatives are rarely physicians or even practicing health care professionals.¹⁹ Far from leaving treatment decisions to physicians, many MCO contracts actually state that whether a certain treatment will be provided is "in the sole judgment of the MCO."²⁰ "You can't do anything anymore without first calling an 800 number where someone with a high-school education asks you to spell out the diagnosis," says Quentin Young, a Chicago physician and president-elect of the American Public Health Association.²¹

There are four basic types of utilization review: retrospective review, concurrent review, prospective review, and case management.²² Under retrospective review, the MCO representative audits the patient's chart after the treatment is provided to determine whether the treatment was medically necessary.²³ Depending on the contract between the treating physician and the MCO, treatment that is determined not medically necessary after retrospective review may not be reimbursed or may be reimbursed at a reduced rate.²⁴

16. Ironically, some physicians who once resisted managed care now file lawsuits after being terminated from a managed care plan that covers a large portion of their patient base. See, e.g., *Harper v. Healthsource N.H., Inc.*, 674 A.2d 962 (N.H. 1996).

17. See *infra* notes 135-43 and accompanying text.

18. Harshbarger, *supra* note 7, at 195.

19. See Phyllis C. Borzi, *Managed Care and ERISA Healthplans*, in FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA—1996, Q245 A.L.I. - A.B.A 133, 137.

20. *Id.*

21. Easterbrook, *supra* note 9, at 65.

22. See Maureen E. Corcoran, *The Management of Managed Care*, in MANAGED CARE CONTRACTING: ADVISING THE MANAGED CARE ORGANIZATION § 1800.06(A) (BNA Health L. & Bus. Series No. 1700, 1996-1998).

23. See *id.*

24. See *id.*

Concurrent review programs constantly monitor the patient's treatment to determine whether continuation of treatment is necessary. This type of review is often used for inpatient hospital stays.²⁵

Prospective review programs are the most problematic. Prospective review requires authorization before the physician can provide the recommended treatment.²⁶ This often involves pre-hospital admission certification, hospital length-of-stay approvals, and second surgical opinions.²⁷ Prospective review programs concern physicians and patients alike because an erroneous decision could result in a denial of coverage by the patient's health insurance company. If the MCO will not pay for the care, the patient could pay out-of-pocket, but the high cost of most medical procedures would preclude many patients from choosing a treatment not covered by their MCO.²⁸ Therefore, an adverse prospective utilization review decision has the practical effect of denying treatment to the patient.

Case management entails the coordination of patient care by a patient's case manager (in a hospital setting) or primary care physician (e.g. family practitioner, internist, or pediatrician). This system is also known as a "gatekeeper system."²⁹ Under a gatekeeper system, the case manager or primary care physician determines whether a patient should see a specialist.³⁰ The patient's specialty care will not be covered by the MCO unless the patient first sees the gatekeeper, whose compensation may be adversely affected by frequent referrals. Under some payment mechanisms a primary care physician may lose money when that physician refers a patient to a specialist for expensive treatment.³¹ Some of the procedures typically performed by more expensive specialists, therefore, are performed by less expensive primary care physicians who may be paid on a capitated fee or a withhold basis.³² Specialists who are more extensively trained in particular areas of medicine may never have the chance to examine a patient and correctly diagnose their particular problem. The result for the patient is less choice in selecting a treating physician, a less qualified physician for the patient's particular problem, or withheld care.³³ A medical malpractice claim based on inadequate, delayed, or withheld treatment implicates both the treating physician and the MCO that established the utilization review system impacting the physician's decision.

25. *See id.*

26. *See Henry, supra* note 12, at 683, 697.

27. *See Corcoran, supra* note 22, § 1800.06(A).

28. *See Larson, supra* note 8, at 50.

29. *See Corcoran, supra* note 22, § 1800.06(B).

30. *See Bator, supra* note 2, at 7.

31. *See Easterbrook, supra* note 9, at 64.

32. *See infra* notes 34-44 and accompanying text.

33. *See Easterbrook, supra* note 9, at 64.

C. Payment Mechanisms

In addition to utilization review, MCOs' payment mechanisms are designed to impact how physicians treat patients. The traditional form of reimbursement for most providers was a straight fee-for-service model. The physician set his or her own fees and the patient paid the full amount out-of-pocket or through health insurance. The more physicians charged, the more the insurance companies paid. Consequently, health care costs and premiums for health insurance continued to rise.³⁴ MCOs changed this. MCOs pay providers using a variety of payment systems, all with the result of reducing health care expenditures for employers and employees.³⁵

Two predominant mechanisms used by MCOs are discounted fee-for-service and capitation.³⁶ A discounted fee-for-service system can either be a flat discount off a physician's scheduled fee (e.g. twenty percent) or a tiered-discount arrangement, where the physician's discount is tied to patient volume.³⁷ By reimbursing the physician less for the same services, physicians may be forced to spend less time with patients in order to maintain an income level necessary to run a viable practice.³⁸ In addition, physicians may treat patients under the MCO's health benefit plan differently than other patients paying the physician's full charges or receiving less of a discount.

However, it is the capitation payment mechanism that is most risky for physicians and MCOs.³⁹ While discounted fee-for-service payment arrangements may pay a physician a reduced fee, the physician still makes money on each service he provides. Under a capitation model, a physician may actually lose money by treating patients.⁴⁰ Under capitation, primary care physicians receive a flat fee per member per month regardless of whether they treat or even see the patient.⁴¹ Each time the primary care physician performs a service, admits a patient to a hospital, or refers a patient to a specialist, that cost is deducted from the primary care physician's capitated fee.⁴² Physicians spending less than the capitated fee, keep the surplus as profit. Physicians spending more than the fixed fee, are contractually obligated by the MCO to provide the care for free. Because of the impact of referrals on a primary care physician's income, there is a disincentive to refer patients to specialists, perform expensive tests, or order

34. See Harshbarger, *supra* note 7, at 194.

35. See Susan Brink & Nancy Shute, *Managed Care Is Pushing Aside the Private-Practice Doctors Typified by TV's Marcus Welby or Dr. Kildare. What's Replacing Them Isn't Making Anyone Smile*, U.S. NEWS & WORLD REP., Oct. 13, 1997, at 60-62.

36. See Easterbrook, *supra* note 9, at 64.

37. See Corcoran, *supra* note 22, § 1800.05.

38. See Furrow, *supra* note 13, at 433.

39. See *id.* at 431.

40. See Corcoran, *supra* note 22, § 1700.05(C); Larson, *supra* note 8, at 50.

41. See Easterbrook, *supra* note 9, at 64 (estimating that the median capitated rate is \$150 per patient per year).

42. See Mark, *supra* note 6, at B25.

inpatient hospital care.⁴³ Ironically, while proponents of managed care criticized the fee-for-service model because it led to overtreating patients, managed care now faces criticism for undertreating patients to maintain income and profits.⁴⁴

MCOs also interfere with the physician-patient relationship. Some MCOs, fearing that physicians may criticize their payment mechanisms and incentives to limit care and access to specialists, place language in their contracts to limit the ability of physicians to consult openly with patients.⁴⁵ "Doctors across the country say that health maintenance organizations routinely limit their ability to talk freely with patients about treatment options and HMO payment policies."⁴⁶ MCOs seek to limit this discussion by placing gag-clauses in physician contracts that limit the power of the physicians to tell their patients certain information such as treatment options and MCO policies.⁴⁷ Some contracts even forbid the physician to criticize the managed care plan, keeping health care consumers in the dark.⁴⁸ No doubt, MCOs want to limit the information available to patients so they will not request expensive treatment, unless the MCO can make the decision to pay for it in advance. Neither physicians nor patients benefit from gag clauses.

II. MANAGED CARE LIABILITY

Because of the utilization review programs used by MCOs and the incentives provided to physicians to limit care, treatment previously provided under fee-for-service health insurance is often denied to patients. When such denial results in harm or death to a patient or a patient's family, they often seek redress by filing suit against the MCO. Currently, plaintiffs who seek to hold MCOs liable for adverse treatment decisions assert multiple causes of action. Individual's claims of liability are often based on state or common law causes of action and include malpractice, vicarious liability (including respondeat superior and ostensible agency),⁴⁹ breach of contract,⁵⁰ breach of warranty, fraud and misrepresentation.⁵¹

43. See Robert Vilensky, *The Liability of Health Maintenance Organizations*, 69 N.Y. ST. B. J. 20 (1997). See also Furrow, *supra* note 13, at 423 (noting that in 1995, 70% of MCOs reported paying primary care physicians through capitation and 50% report paying specialists through a capitation model).

44. See Mark, *supra* note 6, at B25.

45. See generally Paul Gray, *Gagging the Doctors: Critics Charge That Some HMOs Require Physicians to Withhold Vital Information from Their Patients*, TIME, Jan. 8, 1996, at 50. See also Indiana Code section 27-13-15-1 for an example of a state law that prohibits gag clauses. IND. CODE § 27-13-15-1 (1998). "A contract between a health maintenance organization and a participating provider of health care services: . . . (2) may not prohibit the participating provider from disclosing: (A) the terms of the contract as it relates to financial or other incentives to limit medical services by the participating provider; . . ." *Id.*

46. Vilensky, *supra* note 43, at 20.

47. See *id.*

48. See Henry, *supra* note 12, at 705.

49. See Bator, *supra* note 2, at 2. Vicarious liability occurs when an employer becomes

MCOs, in turn, offer multiple theories to avoid liability.⁵² Despite the theory of liability individual plaintiffs employ, MCOs generally argue they cannot be held liable because (1) they do not engage in the practice of medicine and merely act as administrative plan interpreters, (2) they may not be found to engage in the practice of medicine due to the corporate practice of medicine doctrine,⁵³ or (3) such claims are preempted by ERISA.⁵⁴

The first argument MCOs raise is that they cannot be held liable for any treatment decisions because they do not engage in medical decision-making, diagnosis, or treatment. MCOs maintain that their determinations are only administrative ones, such as whether a certain test or treatment is covered under the terms of a plan, while the actual practice of medicine is left to the physicians. MCOs assert this defense even though MCO administrators—through utilization review—are authorizing or withholding payment for medical care and testing. These decisions have just as much effect on the patient as a physician's medical decision, because that decision determines whether the patient will receive the recommended care.⁵⁵ Of course, individuals who are denied coverage could pay the entire cost of the treatment out of their own pocket, but the cost is likely to be prohibitive. Still, MCOs argue that they are only involved in the administration of policies and not medical evaluations.

Second, MCOs raise the corporate practice of medicine doctrine as a defense against liability. MCOs charge that under the corporate practice of medicine doctrine, corporations, including MCOs, cannot practice medicine; therefore, MCOs cannot be held liable for any type of medical malpractice.⁵⁶ The corporate practice of medicine doctrine varies with the jurisdiction because it is founded in the common law, statutory law, and ethical rules established by the medical profession.⁵⁷ However, depending again on jurisdiction, a variety of exceptions

responsible for the actions of an employee (*respondeat superior*) or when a principle becomes responsible for the actions of its agent (*ostensible agency*). MCOs could be held vicariously liable for the actions of a physician through *respondeat superior* if the physician was actually employed by the MCO or works under conditions similar to an employee. MCOs could be held liable though *ostensible agency* if the physician was acting on behalf of the MCO, even though no employment relationship existed. *See id.*

50. *See* Bator, *supra* note 2, at 4 (explaining that breach of contract includes breach of implied covenant of fair dealing, false advertising, breach of fiduciary duty, and misrepresentation of the terms of a policy).

51. *See id.* at 2.

52. *See id.*

53. *See infra* notes 56-58 and accompanying text.

54. *See infra* notes 60-134 and accompanying text.

55. *See* Harshbarger, *supra* note 7, at 194.

56. *See, e.g.,* Dunn v. Praiss, 656 A.2d 413, 415-16 (N.J. 1995); Propst v. Health Maintenance Plan, Inc., 582 N.E.2d 1142, 1143 (Ohio Ct. App. 1990); Williams v. Good Health Plus, Inc., 743 S.W.2d 373, 375-77, 379 (Tex. App. 1987).

57. *See* George F. Indest III & Barbara A. Egolf, *Is Medicine Headed for an Assembly Line? Exploring the Doctrine of the Unauthorized Corporate Practice of Medicine*, 6 BUS. L. TODAY, 32,

exist permitting corporations to practice medicine.⁵⁸ While the corporate practice of medicine doctrine does not currently have a significant impact on MCOs, largely because the doctrine is not stringently enforced, it does exist and presents challenges to future recovery by patients.

The most used and most successful defense against MCO liability is ERISA preemption. MCOs most often raise this defense: Claims against them are preempted by a federal law. Specifically, ERISA regulates employee welfare plans, including employer-sponsored, self-funded health plans.⁵⁹

III. ERISA PREEMPTION

ERISA affirmatively preempts claims against MCOs based on state laws that "relate to" any employee benefit plan.⁶⁰ Because employer-sponsored, self-funded health care plans are considered employee welfare benefit plans covered by ERISA,⁶¹ claims based on state laws arising from such health plans—like medical malpractice claims—are preempted by ERISA.

Ironically, even though MCOs were almost nonexistent when Congress enacted ERISA, ERISA has become the saving grace for MCOs.⁶² MCOs use ERISA to limit their liability, even though this was not its original purpose.⁶³ Congress enacted ERISA to eliminate overlap and conflict between state and federal law as it applied to retirement plans and to protect the financial stability

34 (1997).

58. See Michael A. Dowell, *The Corporate Practice of Medicine Prohibition: A Dinosaur Awaiting Extinction*, 27 J. HEALTH & HOSP. L., 369, 370 (1994). Exceptions include "1) professional medical corporations, partnerships, and group practices owned and operated by licensed professionals; 2) HMOs; 3) non-profit corporations such as medical foundations; and 4) fraternal, religious, hospital, labor, educational, and similar organizations." *Id.* Most significant is the Federal HMO Act, which "incorporates many of the characteristics that the corporate practice of medicine doctrine was designed to protect against." *Id.* at 371. See generally Federal HMO Act, 42 U.S.C. § 300e (1994 & Supp. II 1996) (supporting the prohibition of the corporate practice of medicine, allowing innovations in health care delivery systems to continue to develop and meet the changing needs of employers).

59. 29 U.S.C. § 1001 (1994 & Supp. II 1996).

60. *Id.* § 1144(a) (1994) ("[T]he provisions of [subchapter I] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .").

61. See *id.* § 1002(1) providing:

The term[] 'employee welfare benefit plan' . . . mean[s] any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

62. See Harshbarger, *supra* note 7, at 218 (noting that less than 40 MCOs existed when ERISA was enacted in 1974).

63. See *id.* at 216-17.

of such retirement plans.⁶⁴ ERISA protects participants in employee benefit plans and their beneficiaries by setting certain minimum standards that plans must meet, offering participants ready access to federal courts, and maintaining uniform sanctions and remedies that are available to all participants of benefit plans.⁶⁵

A. ERISA Does Not Cover All Plans

Despite its broad reach, regulating almost all employee benefit plans, ERISA also has its limitations. In order for ERISA to apply, the employee benefit plan must fall within the limits of ERISA's definition of a "covered plan."⁶⁶ In order to be a "covered plan," a plan must be "established or maintained by an employer or employee organization."⁶⁷ The plan must also be self-funded, meaning the employer, through direct employer funding and employee contributions, maintains the plan's reserves.⁶⁸ Even if an employer or employee organization does not intend to create an ERISA plan, does not distribute any materials, and does not comply with ERISA's other requirements, a court is still likely to determine that an employer-sponsored, self-funded plan providing health benefits is an ERISA plan.⁶⁹

However, some health plans are not covered by ERISA. The health plans of churches or church-operated businesses do not fall under ERISA.⁷⁰ Government employees and employees of public agencies are also not covered by ERISA.⁷¹ Independent contractors are not "employees" under ERISA,⁷² unless they are insured by the group plan that covers employees of the employer.⁷³ The scope of ERISA is also limited because it does not preempt state laws regulating insurance, banking, or securities.⁷⁴ However, because ERISA defines insurance so narrowly, this exception is not often implicated.⁷⁵

64. *See id.*

65. *See* Karen A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 YALE J. ON REG. 255, 262-63 (1996).

66. 29 U.S.C. § 1003 (1994 & Supp. II 1996).

67. *Id.* § 1002(1) (1994).

68. *See id.*

69. *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503-04 (9th Cir. 1985); Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

70. 29 U.S.C. § 1003(b) (1994 & Supp. II 1996).

71. *See id.* § 1002(32) (1994).

72. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 319, 327 (1992).

73. *See* Harper v. American Chambers Life Ins. Co., 898 F.2d 1432, 1434 (9th Cir. 1990).

74. 29 U.S.C. § 1144(b)(2)(A) (1994) ("[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.").

75. *Id.* § 1144(b)(2)(B).

Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or

B. The Push for Federal Court

When an individual harmed by an MCO files a claim in state court, the defendant MCO typically moves to have the action removed to federal court, alleging that the state claim is preempted by federal ERISA law because the claim "relates to" an employee benefit plan.⁷⁶ Because MCOs face less potential liability under the provisions of ERISA than in state court, MCOs frequently raise the ERISA preemption defense, preferring to have federal ERISA law rather than state law govern claims against them.⁷⁷ ERISA's remedy provisions provide only for recovery of health plan benefits—like the cost of a treatment or test and sometimes attorneys' fees—while most state laws allow for recovery of consequential and punitive damages.⁷⁸ Further, jury trials are generally not available for claims against ERISA plans, an important advantage considering the highly emotional nature of many claims against MCOs.⁷⁹

MCOs frequently attempt to invoke both complete and substantive preemption. A state law is completely preempted by a federal law when the federal law so completely occupies the field that any complaint arising within the field is necessarily federal in character.⁸⁰ Therefore, if a state law claim falls under ERISA,⁸¹ the claim is considered federal in character and must be tried in

investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts.

Id.

76. Jurisdiction to remove the case to federal court for adjudication by federal law is based on 28 U.S.C. § 1441(b), which states that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable." 28 U.S.C. § 1441(b) (1994). *See also* *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (holding that ERISA preempts anyone from bringing an action in state court where they allege improper process of claims for benefits under any employee benefits plan regulated by ERISA because such claims "arise under the laws of the United States").

77. 29 U.S.C. § 1132(a) (1994).

A civil action may be brought (1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ."

Id.

78. *See Massachusetts Mut. Life Ins. v. Russell*, 473 U.S. 134 (1985).

79. *See Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980).

80. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) (holding that there are areas of law, such as ERISA, that Congress has so completely preempted that any complaint raising this select group of claims is necessarily federal in character).

81. 29 U.S.C. § 1132(a)(1)(B) (1994) (stating that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the

federal court where damages are limited and a jury is unavailable. Because ERISA provides specified remedies, including enforcement of benefits, most negligence claims against MCOs fall under ERISA, thus forcing plaintiffs to adjudicate supplemental state claims in federal court.⁸²

However, if a plaintiff's claim is not one to recover benefits, enforce rights, or clarify rights to future benefits under ERISA's remedial provisions,⁸³ the claim is not completely preempted by ERISA and may not be removable to federal court.⁸⁴ State or federal courts will then examine whether the state claims are nevertheless substantively preempted by ERISA because the claim "relates to" an employee benefit plan governed by ERISA.⁸⁵ If the court finds that the state law claim "relates to" the benefit plan governed by ERISA, the claim is preempted by ERISA and the plaintiff is left without a cause of action, unless the claim may be brought under ERISA's enforcement provisions.⁸⁶ Courts frequently struggle with the "relates to" language, attempting to find a workable definition of how much contact or dependence the state laws have before they "relate to" an employee benefit and are preempted by ERISA.⁸⁷ The "relates to" language is therefore the focus of many ERISA cases involving MCOs.

Currently, circuits are split as to whether ERISA affirmatively preempts claims against MCOs.⁸⁸ Cases are generally judged solely on the specific facts, assuring no reliable outcome and offering no predictability to individuals or MCOs.⁸⁹ An analysis of previous cases, dealing more specifically with managed

plan").

82. See *Taylor*, 481 U.S. at 63-64.

83. 29 U.S.C. § 1132(a)(1)(B) (1994). For example, a plan participant might sue an MCO because the doctor they recommended as a preferred provider was practicing medicine without a license.

84. See 28 U.S.C. § 1441(c) (1994).

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Id.

85. 29 U.S.C. § 1144(a) (1994) ("Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.").

86. See *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995) (holding that if ERISA preemption leaves plaintiff with no cause of action such conclusion does not limit the scope of preemption).

87. See *infra* notes 93-134 and accompanying text.

88. See *infra* notes 95-134 and accompanying text.

89. Cases holding that malpractice claims against MCOs are not preempted by ERISA include: *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995); *Pacificare of Oklahoma v. Burrage*, 59 F.3d 151 (10th Cir. 1995); *Edelen v. Osterman*, 943 F. Supp. 75 (D.D.C. 1996). Cases holding that malpractice claims against MCOs are preempted by ERISA include: *Jass v. Prudential Health*

care liability, demonstrates the unresolved problems confronting courts.⁹⁰ State laws that are generally found to be preempted by ERISA are (1) laws that specifically apply to ERISA plans or which impose a duty on ERISA plans by referencing ERISA plans, (2) common law actions that are within the scope of ERISA's civil enforcement provisions, and (3) laws that mandate specific benefit structures or prohibit a method of determining the level of benefits.⁹¹

Congress, by enacting ERISA, sought to ensure that a uniform set of federal rules regulated employee benefit plans.⁹² Congress intended the "relates to" language to ensure that no state laws compromise the uniform federal laws by attempting to regulate or impact an employee benefit plan. Courts struggle with the "relate to" language, yet are unable to formulate a workable, cohesive doctrine of understanding.⁹³ For example, in *Ingersoll-Rand Co. v. McClendon*,⁹⁴ the Supreme Court held that the "relates to" language should be given broad meaning and that state laws could be preempted even if they did not directly address subjects covered under ERISA.⁹⁵ This broad definition of what "relates to" an ERISA plan has allowed MCOs to evade litigation in state court and keep awards limited to only compensatory damages.

C. ERISA Preempts Claims of Liability

Despite the mandate by the *Ingersoll* decision for broad interpretation of "relates to," courts continue to employ varying interpretations of the "relates to" language, perpetuating a split in the courts. Arguably, this causes inequitable outcomes for injured plaintiffs. For example, the inequity of allowing MCOs to use ERISA to avoid liability was illustrated all too clearly in *Corcoran v. United Healthcare, Inc.*⁹⁶ In *Corcoran*, the court held that ERISA preempted a claim of medical malpractice.⁹⁷ *Corcoran* had health insurance through an employer-

Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Kuhl v. Lincoln National Health Plan*, 999 F.2d 298 (8th Cir. 1993); and, *Corcoran v. United Health Care, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

90. See *infra* notes 95-134 and accompanying text.

91. See *Jordan*, *supra* note 65, at 266-67.

92. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 657 (1995).

93. See *Harshbarger*, *supra* note 7, at 193.

94. 498 U.S. 133 (1990).

95. *Id.* at 138-42.

96. 965 F.2d 1321 (5th Cir. 1992).

97. *Id.* at 1332-33. *Accord* *Kuhl v. Lincoln Nat'l Health Plan*, 999 F.2d 298, 303 (8th Cir. 1993) (holding that a decision not to provide benefits and precertify payment for heart surgery was directly related to the administration of benefits and was therefore preempted by ERISA); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993) (holding that ERISA preempted a claim for negligent administration of benefits); *Butler v. Wu*, 853 F. Supp. 125 (D.N.J. 1994) (holding that claims of malpractice, negligence, breach of warranty, and wrongful death against a doctor and an MCO were all preempted by ERISA).

sponsored ERISA plan administered by Blue Cross & Blue Shield of Alabama. Blue Cross & Blue Shield contracted with United Healthcare, Inc. ("United"), an MCO, to provide utilization review.⁹⁸ While pregnant, Corcoran experienced complications and her physician recommended hospitalization and a Halter Monitor, but United determined that hospitalization was unnecessary.⁹⁹ Instead, United authorized partial day nursing care at Corcoran's home.¹⁰⁰ While the nurse was off duty, the fetus went into distress and died.¹⁰¹

When Corcoran brought a claim against United for medical malpractice, alleging that United had rendered a bad medical decision, United argued that the state law medical malpractice claim was preempted by ERISA.¹⁰² United contended that they had not engaged in a medical determination, but only evaluated what benefits Corcoran's plan covered.¹⁰³ Nevertheless, the court determined that because United's review was prospective rather than retrospective, United's utilization review constituted a medical decision.¹⁰⁴ In *Corcoran*, the court determined that prospective review was closer to a medical recommendation because it is more likely to affect health care decisions than retrospective review.¹⁰⁵

Even though the court in *Corcoran* found United at fault, it held that ERISA preempted the claim because it involved improper handling of a benefits claim.¹⁰⁶ The court characterized the medical decision to deny the inpatient stay and Halter Monitor as "part and parcel" of a benefits decision and sufficiently "related to" the ERISA plan to warrant preemption.¹⁰⁷

Another noted case, finding claims for medical malpractice, wrongful death, and negligence preempted by ERISA and allowed the MCO to avoid liability is *Tolton v. American Biodyne, Inc.*¹⁰⁸ Tolton held health insurance through his employer, United Way-Big Brothers/Big Sisters of Greater Cleveland, who contracted with American Biodyne to provide mental health services.¹⁰⁹ Tolton sought treatment for a drug addiction through Biodyne and, according to its protocol, Biodyne challenged Tolton to remain drug free for five days and then

98. See *Corcoran*, 965 F.2d at 1323; see also *supra* notes 18-33 and accompanying (describing utilization review).

99. See *Corcoran*, 965 F.2d at 1322-24.

100. See *id.* at 1324.

101. See *id.*

102. See *id.* at 1330.

103. See *id.* at 1329.

104. *Id.* at 1331-32. See *supra* notes 22-24 and accompanying text (discussing prospective and retrospective review).

105. *Corcoran*, 965 F.2d at 1331.

106. *Id.* See also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (holding that a charge of improper processing of claims is within the scope of ERISA section 502(a) and therefore preempted).

107. *Corcoran*, 965 F.2d at 1332.

108. 48 F.3d 937 (6th Cir. 1995).

109. See *id.* at 939-40.

return for consultation, despite Tolton's request for inpatient care.¹¹⁰ After several unsuccessful attempts at rehabilitation in residential treatment facilities, Tolton appeared in a hospital emergency room seeking treatment for his suicidal thoughts and was again referred to a state sponsored crisis center.¹¹¹ Several days later, Tolton committed suicide.¹¹² When Tolton's wife filed suit against the MCO, the court found all claims preempted by ERISA because they arose from a refusal to treat under an ERISA plan. The court reasoned that American Biodyne simply determined benefits under Tolton's plan.¹¹³

D. ERISA Does Not Preempt Claims of Liability

While most courts hold that ERISA preempts any state regulation remotely related to an employer-sponsored, self-funded plan, as expressed in *Corcoran* and *Tolton*, some courts have taken a more narrow interpretation of ERISA's "relates to" language. These courts have found that ERISA does not preempt medical malpractice, negligence, and vicarious liability claims against MCOs.¹¹⁴ Courts deciding against MCOs evidence both a creative plaintiff's bar and a growing frustration of the judiciary in MCOs' use of ERISA to avoid liability for improper medical decisions. Although these cases are victories for the individual plaintiffs, the similarity with cases finding claims preempted adds to the confusion facing plaintiffs and the courts today.

For example, in *Rice v. Panchal*,¹¹⁵ the court limited ERISA's reach by finding that ERISA did not preempt a claim of medical malpractice against Prudential.¹¹⁶ In *Rice*, the plaintiff held insurance through his employer, Handy Andy, Inc., who obtained health insurance for its employees through

110. See *id.* at 940.

111. See *id.*

112. See *id.*

113. *Id.* at 942. Further, the court held that "[t]he fact that Tolton was refused benefits pursuant to utilization review does not alter our preemption analysis" and the fact "that ERISA does not provide the full range of remedies available under state law in no way undermines ERISA preemption." *Id.* at 942-43.

114. See *infra* notes 115-34 and accompanying text.

115. 65 F.3d 637 (7th Cir. 1995).

116. *Id.* Accord *Smith v. HMO Great Lakes*, 852 F. Supp. 669 (N.D. Ill. 1994) (holding that ERISA did not prevent a claim of medical malpractice arising out of the implementation of cost containment procedures against an HMO, because claims of negligence were not dependent on the employee benefit plan, but instead concerned the relationship between the HMO and the medical provider rather than the beneficiary of the plan); *Elsesser v. Hospital of Phila. College*, 802 F. Supp. 1286 (E.D. Pa. 1992) (holding an MCO liable when it failed to provide a competent physician because Congress did not intend for ERISA to proscribe standards of professional liability because it is an area traditionally under state control); *Independence HMO, Inc. v. Smith*, 733 F. Supp. 983 (E.D. Pa. 1990) (holding that a state cause of action based on vicarious liability was not preempted by ERISA because the claim of vicarious liability had no relation to any denial of rights under the employee benefit plan, thus, the claim could exist outside of the scope of ERISA).

Prudential.¹¹⁷ Rice claimed Prudential's lengthy utilization review procedures delayed his treatment and resulted in permanent physical harm.¹¹⁸ Rice further alleged that Prudential was liable for the medical malpractice of the physicians included in his employer-sponsored benefit plan, based on the state law of respondeat superior, because they were selected by Prudential.¹¹⁹ The court held that ERISA did not preempt a respondeat superior claim against Prudential because the claim could be adjudicated without interpretation of the employee benefit plan at issue.¹²⁰

Similarly, in *Pacificare of Oklahoma, Inc. v. Burrage*,¹²¹ the Tenth Circuit found that ERISA did not preempt a vicarious malpractice claim even though it concerned the delivery of benefits under an ERISA plan.¹²² The plaintiff brought a vicarious malpractice and wrongful death suit against her husband's MCO, Pacificare, alleging that his death resulted from a Pacificare primary physician's malpractice.¹²³ The court held that ERISA did not preempt either claim because the issue of the physician's negligence could be decided without reference to the employee benefit plan.¹²⁴ The court reasoned that the malpractice claim did not "relate to" the employee benefit plan governed by ERISA because it "does not involve a claim for benefits, a claim to enforce rights under the benefit plan or a claim challenging administration of the benefit plan."¹²⁵

In the U.S. Supreme Court's most recent decision analyzing ERISA preemption and health care, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,¹²⁶ the Court adopted a narrow view of ERISA's "relates to" language. The Court held that ERISA did not preempt a state law that required the addition of surcharges to hospital bills of patients covered by ERISA.¹²⁷ In evaluating whether the regulations at issue in *Travelers* "related to" an employee benefit plan, the Court found that the surcharge regulations only had an indirect economic influence,¹²⁸ therefore, the surcharge did not rise to the level of "relating to" the employee benefit plan.¹²⁹ In *Travelers*, the Court found that Congress, in enacting ERISA, did not intend to supplant state laws.¹³⁰ The Court further stated that the purpose of the preemption clause "was to avoid a multiplicity of regulation in order to permit

117. *Rice*, 65 F.3d at 638.

118. *See id.*

119. *See id.* at 642.

120. *Id.*

121. 59 F.3d 151 (10th Cir. 1995).

122. *Id.* at 154-55.

123. *Id.* at 152.

124. *Id.* at 154.

125. *Id.*

126. 514 U.S. 645 (1995).

127. *Id.* at 649.

128. *Id.* at 659-60.

129. *Id.* at 662.

130. *Id.*

the nationally uniform administration of employee benefit plans.”¹³¹ The Court narrowed its previous interpretation of “relates to,” finding that a broad definition seemed to imply that few state laws would be valid because some small connection could always be maintained.¹³²

Although *Travelers* clearly applied a more narrow view of the “relates to” language, the holding spoke more to economic effects of regulations and not directly to MCO liability.¹³³ While *Travelers* narrowly interpreted ERISA, nothing in the Court’s opinion definitively included tort actions or claims for negligent administration of benefits.¹³⁴ Further, there is no indication that *Travelers* has led to a reevaluation of claims against MCOs in the lower courts. Because there is no direct language in *Travelers* calling for such a reevaluation, change is unlikely to come in a timely manner and correct the problems currently facing individuals enrolled in MCOs. While *Travelers* may call for reevaluation of the “relates to” doctrine based on economic effect, it is not a strong enough pronouncement to make a timely impact on heightened managed care liability. Plan participants who believe they have been harmed, as well as MCOs concerned about liability, are still forced to muddle through the confusion created by the split in the circuits.

IV. NATIONWIDE BACKLASH

Today, public criticism of MCOs is widespread. Accounts of denials of treatment, gag clauses prohibiting doctors from discussing treatment options with patients, shortened hospital stays, delays in testing, refusals to provide emergency care, along with the huge corporate bonuses earned by MCO executives, has brought managed care liability into the limelight.¹³⁵ Chronicles of managed care mismanagement even peaked the interests of Hollywood. In 1997, two blockbuster movies, *The Rainmaker*¹³⁶ and *As Good As It Gets*¹³⁷ dealt with issues of managed care liability. One health insurance executive recently reported that during a screening of *As Good As It Gets*, when one of the movie’s main characters harshly criticized the treatment her son received from his MCO, patrons in the theater actually stood up to applaud.¹³⁸

131. *Id.* at 657.

132. *Id.* at 655-56, 660.

133. *Id.* at 659-60.

134. One commentator argues that the decision in *Travelers* is an indication that courts should restrain the scope of the ERISA preemption defense. She states, “[t]he pragmatic and more delineated analytical framework could lead lower courts out of the current state of utter confusion. That is, if courts adopt a uniform approach to the [preemption] question, there is at least a greater potential for uniformity in the outcome.” Jordan, *supra* note 65, at 305.

135. See Brink & Shute, *supra* note 35, at 60.

136. *THE RAINMAKER* (Paramount 1997).

137. *AS GOOD AS IT GETS* (Tri-Star 1997).

138. *Outliers: Reform Plan Buried, Court Rules on Secrecy, and Battle Still Rages*, MOD. HEALTHCARE, Jan. 19, 1998, at 44.

Publicity from Hollywood, along with accounts of managed care mismanagement, are pervasive in the print media. A recent *Time Magazine* article exposed the frustrations many encounter with managed care and the enormous salaries earned by MCO executives.¹³⁹ The article detailed how one woman was denied a bone marrow transplant because her health plan deemed it experimental and was unwilling to pay for treatment where positive results were allegedly unlikely. Ironically, the \$92,000 cost of the transplant denied by the MCO was only 0.08% of the \$11.7 million that the MCO had available in its transplant pool.¹⁴⁰

MCOs have not escaped the effects of the bad publicity. Because of their poor public image, complicated acquisitions and mergers, rising medical costs, and a growing body of anti-managed care legislation, many MCOs are struggling with losses and slumping earnings.¹⁴¹ MCOs are likely to experience declining profits as lawmakers at both the federal and state levels, eager to demonstrate their willingness to fight for their constituents, seek to restrict the cost containment techniques used by MCOs. In 1998, President William J. Clinton made health care reform a national priority by widely promoting his Patient Bill of Rights.¹⁴² The Patient Bill of Rights advocates accessible emergency care, managed care liability, immediate review of coverage denials, and adoption of minimal standards of coverage.¹⁴³ While President Clinton's proposal was not passed by Congress into law, it demonstrates the prominence of health care reform in the national agenda.

State lawmakers have also jumped on the anti-managed care bandwagon. In 1997, states collectively passed 182 laws dealing with managed care.¹⁴⁴ Some state legislatures are so frustrated with the confusion over managed care liability and the success of MCOs in escaping liability, that they are proposing laws to create a state cause of action for individuals harmed by MCOs. In 1997, Texas passed a bill that allows patients to sue MCOs for injuries resulting from a

139. Larson, *supra* note 8, at 45. Larson recounts Chirsty deMeurers's unsuccessful three year battle with breast cancer along with her battle with her MCO, who constantly denied a bone marrow transplant. Larson also reports that while denying deMeurer's claims, the head of her MCO made a base salary of \$658,713, a bonus of \$815,000, and an additional \$300,000 from an incentive plan. *See id.*; see also George J. Church, et al., *Backlash Against HMOs Doctors, Patients, Unions, Legislators Are Fed Up and Say They Won't Take it Anymore*, TIME, Apr. 14, 1997, at 32; Paul Gray, *Gagging the Doctors: Critics Charge That Some HMOs Require Physicians to Withhold Vital Information from Their Patients*, TIME, Jan. 8, 1996, at 50 (discussing physician gag clauses).

140. *See* Larson, *supra* note 8, at 49.

141. *See* Louise Kertesz, *Managed Crisis—Bad Publicity, Slumping Earnings Hit HMOs*, MOD. HEALTHCARE, Jan. 5, 1998, at 30 (reporting large 1997 losses for Kaiser Permanente, PacifiCare, Aetna U.S. Healthcare, Oxford Health Plans, and Prudential HealthCare).

142. *See* Julius A. Karash, *Managed-Care Firms in Area Not Enthusiastic About Bill*, KAN. CITY STAR, Jan. 29, 1998, at A10.

143. *See id.*

144. *See* Brink & Shute, *supra* note 35, at 63.

refusal to cover necessary treatment.¹⁴⁵ A U.S. District Court recently upheld a challenge to this new law but limited its application.¹⁴⁶ The portion of the Texas law that created an independent review process to evaluate adverse benefit determinations was held to be preempted by ERISA, thereby limiting the impact of the legislation. Missouri also passed similar but less comprehensive legislation prohibiting MCOs from forcing providers to indemnify the MCO for damages incurred.¹⁴⁷ In addition, Florida,¹⁴⁸ Connecticut,¹⁴⁹ Pennsylvania,¹⁵⁰ Massachusetts,¹⁵¹ and several other states are working to pass laws heightening the liability of MCOs.¹⁵²

While many states report that anti-managed care legislation is on the agenda,¹⁵³ the proposed legislation may have little impact on heightening managed care liability because it can only apply to non-ERISA plans.¹⁵⁴ Further,

145. See Leslie Nicholson, *State HMO Liability Laws May be Stymied by ERISA Preemption*, 14 No. 8 MED. MALPRACTICE L. & STRATEGY, June 1997, at 1. The Texas bill became law on June 6, 1997 without Governor George W. Bush's signature. The bill eliminates the corporate practice of medicine doctrine as a defense against MCO liability, revises existing utilization review standards to provide for expedited appeal and independent review, and prohibits MCOs from requiring providers to be responsible for the plan's actions. See *Managed Care—Laws Expanding Health Plan Liability Pose Challenge to ERISA Preemption*, 5 HEALTH CARE POL'Y REP. (BNA) 1891 (Dec. 22, 1997) [hereinafter *Managed Care Laws*].

146. *Corporate Health Ins. Inc. v. Texas Dep't of Ins.*, 12 F. Supp. 2d 597 (S.D. Tex 1998).

147. See *Managed Care Laws*, *supra* note 145, at 1891 (explaining the Missouri legislation passed on June 30, 1997). This legislation repeals the corporate practice of medicine doctrine, but it is limited because it applies only to licensed MCOs. See *id.*

148. The Florida legislature passed a bill allowing patients to sue MCOs but Governor Lawton Chiles vetoed the bill. See Nicholson, *supra* note 145, at 2.

149. "Connecticut Gov[ernor] John Rowland signed a measure tightening oversight of [MCOs] and giving consumers the right to appeal [MCO] decisions when they are denied coverage." *Id.*

150. The Pennsylvania legislature proposed the Quality Health Care Protection Act that would prohibit managed care provider contracts from including gag clauses, require managed care plans to cover emergency care, and increase patient access to specialist. See *Pennsylvania—Senate Panel Approves Safeguards for Managed Care Plan Subscribers*, 5 HEALTH CARE POL'Y REP. (BNA) 1897 (Dec. 22, 1997).

151. Massachusetts Governor Paul Cellucci proposed legislation to establish an accreditation board, a prohibition against physicians working for non-accredited MCOs, guaranteed coverage of emergency services, and a ban on gag-clauses. See *Massachusetts—Cellucci Seeks Managed Care Regulation, Predicts Passage of Consensus Legislation*, 6 HEALTH CARE POL'Y REP. (BNA) 132 (Jan. 19, 1998).

152. See Nicholson, *supra* note 145, at 2-3. The New York legislature also reports to be working on similar legislation for its next session. See *id.*

153. Forty states report anti-managed care legislation. See Constantine G. Papavizas & Norman F. Lent III, *HMO Legislation is Aimed at Protecting Patients: Consumers and Providers Call for Regulation; The Managed Care Industry Would Disagree*, NAT'L L.J., Apr. 7, 1997, at B8.

154. See *Managed Care Laws*, *supra* note 145, at 1892.

state regulation could result in varying degrees of liability from state to state. These state laws may only contribute to the already complex maze of state laws preempted by federal legislation that offer few guarantees to patients that their claims will be addressed fairly, regardless of the jurisdiction in which they reside. While the idea behind these state laws is noble, they may be preempted by ERISA and the same problems will continue.

V. THE MANAGED CARE PLAN ACCOUNTABILITY ACT OF 1997

The MCPAA represented an effort to eliminate much of the confusion, by offering a definitive answer as to when ERISA preemption applies to managed care. The bill's author and chief sponsor, Fortney "Pete" Stark, says the MCPAA "would clear up the legal confusion over ERISA by giving patients the right to sue their health plans in federal court for compensatory as well as punitive damages, which can run into the millions of dollars."¹⁵⁵ He goes on to state that "HMOs have tried to shirk their responsibility to their patients by arguing technicalities shielded them from malpractice suits."¹⁵⁶ Stark further states that the motivation behind the act is "to guarantee that plans are responsible for their actions. If HMOs make bad medical decisions, the HMOs should be liable for their actions, just like other health care providers are today."¹⁵⁷

Despite Stark's enthusiasm, the bill does have its critics, primarily those within the managed care industry. Don White, a spokesman for the American Association of Health Plans, which represents MCOs, states, "[i]t appears that the Stark legislation would do little to promote high-quality and reasonably priced health care but much to increase litigation and provide employment for trial attorneys."¹⁵⁸ Undoubtedly, many individuals in the managed care industry who profit from the various cost-cutting measures employed by most MCOs would suffer if MCOs were held legally and financially liable for those decisions.

Sentiment is so strong on both sides of the debate because passage of an act like the MCPAA could result in broad changes, thereby forcing MCOs to reevaluate the fundamentals of how they operate. The MCPAA would hold group health plans or health insurance issuers, including MCOs, liable for damages if they fail to provide benefits in accordance with the terms of the plan because of a clinically or medically inappropriate decision resulting from cost containment measures.¹⁵⁹

Specifically, the MCPAA amends both ERISA and the Internal Revenue Code of 1986 "to improve and clarify accountability for violations with respect to managed care group health plans."¹⁶⁰ The MCPAA would expand ERISA's

155. *Bill Would Allow Patients to Sue Plans*, AM. POL. NET. INC. HEALTH LINE, May 23, 1997, at 3.

156. *Id.*

157. *Id.*

158. Carlsen, *supra* note 11.

159. H.R. 1749, 105th Cong. (1997).

160. *Id.*

civil enforcement provisions to provide a remedy for “cost driven violations of plan[s].”¹⁶¹ Under the MCPAA, MCOs could be held liable if a negligent denial of care resulted from any cost containment procedure or from any medical care delivery policy that interfered with the ability of medical professionals to fully advise and treat patients.¹⁶² For example, such cost-cutting procedures and policies would include gag-clauses prohibiting physicians from communicating openly with patients, use of gatekeepers to limit patient’s use of specialty care, capitation, and utilization review.

The MCPAA also amends ERISA’s remedial provisions to include compensatory and punitive damages.¹⁶³ The MCPAA would hold MCOs liable for actual, compensatory, consequential, and, in some cases, punitive damages.¹⁶⁴ This substantial change would mean that individuals who were wrongly denied a certain medical treatment because of an MCO’s cost containment measures could collect more than just the cost of the denied treatment, unlike the current law. Under the MCPAA, harmed individuals could collect damages for further medical treatment, to correct any error made by the MCO, lost wages, lost consortium, and punitive damages meant to punish the MCO for its improper decision.¹⁶⁵

161. H.R. 1749 § 2(a)(1) provides:

(a) ADDITIONAL REMEDIES FOR COST-DRIVEN VIOLATIONS OF PLAN TERMS—

(1) IN GENERAL—Section 502(c) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(c)) is amended—

(A) by redesignating paragraph (6) as paragraph (7); and

(B) by inserting after paragraph (5) the following new paragraph:

(6)(A) In any case in which a group health plan, or a health insurance issuer offering health insurance coverage in connection with such plan, provides benefits under such plan under managed care, and such plan or issuer fails to provide any such benefit in accordance with the terms of the plan or such coverage, insofar as such failure occurs pursuant to a clinically or medically inappropriate decision or determination resulting from—

(i) the application of any cost containment technique,

(ii) any utilization review directed at cost containment, or

(iii) any other medical care delivery policy decision which restricts the ability of providers of medical care from utilizing their full discretion for treatment of patients

162. H.R. 1749 § 2(a)(1).

163. H.R. 1749 § 2(a)(1)(B) would amend ERISA to say:

each specified defendant shall be jointly and severally liable to any participant or beneficiary aggrieved by such failure for actual damages (including compensatory and consequential damages) proximately caused by such failure, and may, in the court’s discretion, be liable to such participant or beneficiary for punitive damages.

164. *Id.*

165. *Id.*

The MCPAA further contains a provision that defines the type of plans to which the additional ERISA provisions will apply.¹⁶⁶ The MCPAA applies to those plans that provide benefits under a managed care plan either by providing care through participating providers, such as a list of physicians participating in the plan, or providing financial incentives, such as low copayments or deductibles to encourage participants to visit participating physicians, or both.¹⁶⁷

The MCPAA also offers protection for physicians against liabilities created by MCO's cost containment procedures.¹⁶⁸ The MCPAA provides full

166. H.R. 1749 §2(a)(1)(B) would amend ERISA to say:

For purposes of this paragraph—

(i) a group health plan, or a health insurance issuer offering health insurance coverage in connection with the plan, provides benefits under 'managed care' if the plan or the issuer—

(I) provides or arranges for the provision of the benefits to participants and beneficiaries primarily through participating providers of medical care, or

(II) provides financial incentives (such as variable copayments and deductibles) to induce participants and beneficiaries to obtain the benefits primarily through participating providers of medical care, or both.

167. H.R. 1749 § 2(a)(1)(B).

168. H.R. 1749 § 2(a)(2)(B) provides:

Section 502 of such Act (29 U.S.C. 1132) is amended further by adding at the end of the following new subsection:

(n)(1) In any such case in which a group health plan, or a health insurance issuer offering health insurance coverage in connection with such plan, provides benefits under such plan under managed care, the plan shall provide for full indemnification of any participating provider of medical care for any liability incurred by such provider for any failure to provide any such benefit in accordance with the terms of the plan or such coverage, if such failure is the direct result of a plan restriction on medical communications under the plan.

(2) For purposes of this subsection—

(A) the term 'plan restriction on medical communications under a group health plan means a provision of the plan, or of any health insurance coverage offered in connection with the plan, which prohibits, restricts, or interferes with any medical communication as part of—

(i) a written contract or agreement with a participating provider of medical care,

(ii) a written statement to a participating provider of medical care, or

(iii) an oral communication to a participating provider of medical care.

indemnification to physicians bound by plan restrictions, such as gag clauses, if the limitations in the provider's contract interfered with medical communications.¹⁶⁹ The MCPAA would fully indemnify a physician if he faced liability because a managed care contract kept him from freely advising his patient, resulting in harm to the patient.¹⁷⁰ This would not be a complete bar to physician liability, but would hold MCOs accountable for their policies.

The MCPAA also amends the Internal Revenue Code of 1986 by establishing an excise tax for cost-driven violations of benefit plans.¹⁷¹ The MCPAA would hold MCOs liable if the coverage provider fails to provide any benefit outlined in the plans terms.¹⁷² Excise tax fines could also be imposed if a MCO physician fails to provide a benefit due to a clinically or medically inappropriate decision resulting from cost containment, utilization review, or a medical care delivery policy decision restricting the ability of health care professionals to use full discretion in treatment and diagnosis.

A. An Act Whose Time Has Come

MCOs can provide much needed medical care through innovation in a market where the cost of quality medical care is steadily growing. MCOs can also provide quality care at a fair cost, allowing many employers to offer group health care coverage they may not otherwise be able to afford. Still, despite these advancements, the development and regulation of managed care has presented problems. Managed care does not fare well in public opinion.¹⁷³ The changes suggested in the MCPAA could improve both the overall quality and the image of available medical care.

169. *Id.* See also *supra* notes 45-48 and accompanying text (discussing gag-clauses).

170. H.R. 1749 § 2(a)(2)(B).

171. H.R. 1749 § 3(a) provides:

Chapter 100 of the Internal Revenue Code of 1986 is amended by adding at the end of the following new subchapter:

(a) In the case of a group health coverage to which this section applies, there is a failure to meet the requirements of this chapter if—

(1) the provider of such coverage fails to provide any benefit in accordance with the terms of the coverage, and

(2) such failure occurs pursuant to a clinically or medically inappropriate decision or determination resulting from the application of—

(A) any cost containment technique,

(B) any utilization review directed at cost containment, or

(C) any other medical care delivery policy decision which restricts the ability of providers of medical care from utilizing their full discretion for treatment of patients.

172. *Id.*

173. See Easterbrook, *supra* note 9, at 60; see also *supra* notes 135-43 and accompanying text.

First, the MCPAA would protect physicians from unfair lawsuits by making health plans responsible for the constraints they place on providers. This protection would improve patient-physician relations by freeing physicians from some of the constraints under which they currently practice. Physicians would no longer be forced to ration health care by limiting treatment and referrals to specialists to preserve their capitated payments. Also, physicians would be able to communicate openly with their patients and prescribe the best treatment available, even if it is not the one endorsed as most cost efficient by the MCO.

Second, the MCPAA would create an incentive for MCOs to engage in responsible treatment decisions. Under the current civil enforcement provisions of ERISA, MCOs face little financial risk in denying treatment or testing because, outside of attorney's fees, MCOs likely will pay only the cost of the denied testing or treatment should the plaintiff succeed in a lawsuit.¹⁷⁴ Under current law, little incentive exists to err on the side of caution because a victory for a challenging plaintiff costs little more than the cost of withholding treatment, especially considering that not all patients who are wrongly denied treatment or testing are likely to pursue legal vindication of their rights. The MCPAA would force MCOs to be more aggressive in guarding against negligent decisions because the cost of litigation and the possibility of expensive compensatory and punitive damages would often not be worth the risk of denying coverage if the MCO's administration had any doubts.

Third, under current law there is a gross difference in the amount of compensation available for persons covered under an ERISA plan and those who are not when identical harms occur.¹⁷⁵ Persons whose health plans are not governed by ERISA can now collect actual as well as compensatory and punitive damages because they are not limited by ERISA's remedial provisions. In contrast, individuals who are covered by ERISA may not seek comparable damages.¹⁷⁶

For example, in *Fox v. Health Net*,¹⁷⁷ the plaintiff's health plan was not subject to ERISA, which meant she could seek greater damages and the jury awarded one of the largest known medical malpractice judgments against an HMO, \$89 million.¹⁷⁸ In *Fox*, the insured's physician diagnosed advanced breast

174. See Carlsen, *supra* note 11.

175. See Harshbarger, *supra* note 7, at 198.

176. See *supra* notes 96-113 and accompanying text.

177. No. 219692 (Cal. Super. Ct. Dec. 23, 1993).

178. Harshbarger, *supra* note 7, at 198 (citing David Leon Moore, *Can Your HMO Hurt You?*, USA TODAY, Jan. 22, 1996, at D2). In *Fox*, the plaintiff had insurance through a public school benefit plan. See Jake McCarthy & Jeremy Berzon, *HMO Award Sends "Shock Waves: It Encourages Lawmakers Seeking to Rewrite Laws, Worries the Health-Insurance Industry and Buys Patient-Rights Activists*, PRESS-ENTERPRISE (Riverside, Cal.), Jan. 23, 1999. ERISA did not preempt state law claims for punitive damages because ERISA does not cover governmental plans. See Harshbarger, *supra* note 7, at 198.

In February 1999, a California jury awarded \$120.5 million in damages to Teresa Goodrich when Aetna U.S. Healthcare refused to treat her husband's cancer. This represents the largest

cancer but her health plan refused to pay for bone marrow transplantation, largely because they considered it "experimental."¹⁷⁹ Yet, the court found that ERISA did not preempt her claim because the insured carried her health plan through a governmental plan *not* regulated by ERISA.¹⁸⁰

In contrast, in *Turner v. Fallon Community Health Plan Inc.*,¹⁸¹ Turner's physician also diagnosed advanced breast cancer and her MCO, Fallon, refused to cover a bone marrow transplant.¹⁸² When Mr. Turner brought suit against Fallon on behalf of his deceased wife, the court found the plan was subject to ERISA and the claim was preempted.¹⁸³ Turner recovered no damages.

The discrepancy between *Fox* and *Turner* is unjust: One plaintiff collects the largest judgment against an MCO to date while the other collects nothing, simply because ERISA covered one plan and not the other. MCOs that operate under ERISA should be held to the same standards as those health care organizations that do not operate under ERISA and are open to a higher degree of liability because they operate in the same market. MCOs would be able to financially withstand the heightened liability created by the Act and would not place America's retirement and employer sponsored group health plans in danger. Large MCOs often have in excess of \$1 billion in liquid assets and most midsize MCOs have in excess of \$500 million.¹⁸⁴

Fourth, MCOs should be held liable for inadequate utilization review because utilization review determines the medical appropriateness of treatment or testing for a certain patient. A physician would certainly be held liable for making such a decision and the MCO, if engaging in a medical determination, should be held to the same standard. Despite the MCOs argument that they are simply making an administrative determination of whether a certain treatment falls within the limits of an individual's policy, the administrators do categorize some treatments as unnecessary, which is arguably a medical or clinical determination. MCOs, in an effort to contain cost, weigh the necessity of a medical procedure against its cost and engage in decisions outside of simple procedural ones.

Fifth, legislative action is needed because federal case law has not filled the void left by ERISA. Because ERISA preempts state laws that attempt to regulate MCOs, "a vacuum is created in which the states may not regulate and Congress

known medical malpractice judgment against an HMO. Like the plaintiff in *Fox*, Goodrich's health plan was not subject to ERISA. See *Aetna Held Liable for Death of Insured*, NAT'L L.J., Feb. 1, 1999, at B4.

179. See Elizabeth C. Price, *The Evolution of Health Care Decision-Making: The Political Paradigm and Beyond*, 65 TENN. L. REV. 619, 633 (1998).

180. See *id.*; see also 29 U.S.C. § 1003(b)(1) (1994 & Supp. II 1996); *supra* note 71 and accompanying text.

181. *Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir. 1997). See also *First Circuit Affirms Ruling that ERISA Does Not Provide Damages Remedy for Plan's Refusal to Cover Excluded Treatment*, HEALTH L. DIGEST (BNA), Nov. 1997, at 41.

182. *Turner*, 127 F.3d at 197.

183. *Id.* at 198-99, 200.

184. See Harshbarger, *supra* note 7, at 222.

has not—a vacuum that is slowly being filled by judge-made, federal common law. The result has been fragmented, inefficient, and inappropriate regulation of MCOs at both the state and federal levels.”¹⁸⁵ Congress could eliminate the vacuum by passing the MCPAA, which offers definitive answers where the courts have not by amending ERISA to create a right of action where none existed before. This would put an end to the uncertainty of judicial decisions regarding ERISA. Health care now exists in somewhat of an unregulated market¹⁸⁶ and the MCPAA would offer uniform federal regulation that would protect patients by holding an MCO responsible for its actions.

Sixth, the MCPAA would restore the regulation of health to its traditional position as a state function. The Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers* held that “in cases like this one, where federal law is said to bar state action in fields of traditional state regulation” such as regulation of health and welfare, “the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹⁸⁷ The Court in *Travelers* examined the legislative history of ERISA and found nothing definitive in ERISA’s language indicating an intent to usurp state health regulation power.¹⁸⁸ The Court also pointed to a strong presumption against preemption where health care regulations within the traditional police power of the states are concerned.¹⁸⁹

Seventh, in the field of managed care, ERISA has not met its goal of uniform regulation. The goal behind ERISA was to provide uniform regulation for employer-sponsored retirement plans, yet liability of managed care provided by ERISA plans still remains in flux. While most courts hold that ERISA does preempt claims of negligence outside of ERISA, some courts have found such claims are not preempted. This confusion aggravates ERISA’s goal of uniformity and creates uncertainty. This uncertainty surrounding managed care liability could be solved by the passage of the MCPAA.

Finally, passage of legislation interpreting ERISA would allow Congress to speak regarding regulation of the managed care industry. Congress did not have this opportunity when ERISA was originally passed because managed care had not yet entered the health care market in the capacity it now holds. Because the traditional fee-for-service model was much more prevalent than managed care when Congress passed ERISA, the legislators did not consider the ramifications of limiting the liability of MCOs.¹⁹⁰ Congress now has the opportunity to provide for the uniform regulation of health care plans by clearly setting out what remedies are available to individuals harmed by the cost cutting measures that

185. Margaret G. Farrell, *ERISA and Managed Care: The Law Abhors a Vacuum*, 29 J. HEALTH & HOSP. L. 268 (1996).

186. *See id.*

187. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 655 (1995).

188. *Id.* at 656-57.

189. *Id.* *See also* Jordan, *supra* note 65.

190. *See* Harshbarger, *supra* note 7, at 216.

drive MCOs. The courts have indicated not only a need to reevaluate ERISA, but have allocated the job to Congress.¹⁹¹

B. Where Did the MCPAA Go?

Representative Stark introduced the MCPAA on May 22, 1997.¹⁹² In his remarks to the House of Representatives, immediately after introducing the bill, he stated, "[o]ur legislation is fair and long overdue. Plans that actively manage the care of their enrollees must be held accountable for their decisions. Employees of ERISA-regulated health plans deserve the same rights and protections as people in non-ERISA plans."¹⁹³ The bill was promptly referred to both the House Committee on Education and the Workforce and the House Committee on Ways and Means for consideration.¹⁹⁴ When subsequently referred to the Subcommittee on Employer-Employee Relations on June 17, 1997, the MCPAA died in committee.¹⁹⁵ The MCPAA attracted thirty-one cosponsors, the last of whom joined in mid-November 1997.¹⁹⁶ However,

191. See *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992) (holding ERISA preempts state medical malpractice claims against an MCO). The court stated:

While we are confident that the result we have reached is faithful to Congress's intent neither to allow state-law causes of action that relate to employee benefit plans nor to provide beneficiaries in the Corcorans' position with a remedy under ERISA, the world of employee benefits has hardly remained static since 1974. Fundamental changes such as the widespread institution of utilization review would seem to warrant a reevaluation of ERISA so that it can continue to serve its noble purpose of safeguarding the interests of employees. Our system, of course, allocates this task to Congress, not the courts, and we acknowledge our role today by interpreting ERISA in a manner consistent with the expressed intentions of its creators.

Id. at 1338-39.

192. H.R. 1749, 105th Cong. (1997).

193. 143 CONG. REC. E1036 (May 22, 1997).

194. See H.R. 1749, Bill Tracking Report, 105th Cong. (1997).

195. See *id.*

196. Co-sponsors joining on May 22, 1997 included: Representatives Howard L. Berman (D-CA), Ronald V. Dellums (D-CA), George Miller (D-CA), Nancy Pelosi (D-CA), Ellen O. Tauscher (D-CA), Henry A. Waxman (D-CA), John Lewis (D-GA), Barney Frank (D-MA), James P. McGovern (D-MA), John F. Tierney (D-MA), Dale Kildee (D-Mich), Lynn N. Rivers (D-MI), Nita Lowey (D-NY), Charles B. Rangel (D-NY), Dennis J. Kucinich (D-OH), Peter A. DeFazio (D-OR), Patrick J. Kennedy (D-RI), Martin Frost (D-TX), Bernard Sanders (I-VT), Donna M. Christian-Green (D-VI), and Gerald D. Kleczka (D-WI). Co-sponsors joining on July 14, 1997 included: Representatives Lynn C. Woolsey (D-CA), David E. Bonior (D-MI), and Thomas M. Foglietta (D-PA). Representative Frank Pallone Jr. (D-NH) joined on October 28, 1997. Representatives Lane Evans (D-IL), Sidney R. Yates (D-IL), Jerrold Nadler (D-NY), and Eddie Bernice Johnson (D-TX) joined as cosponsors on November 6, 1997. Representative Robert A. Weygand (D-RI) joined on November 12, 1997 and Representative Marcy Kaptur (D-OH) joined on November 13, 1997. See *id.*

support for the MCPAA was diluted by the presence of several other managed care reforms also before Congress that are discussed in the next section. Despite the fact that the MCPAA did not pass, similar legislation is likely to appear before future Congresses and the MCPAA represents a first step in solving a difficult problem.

VI. OTHER PROPOSED MANAGED CARE LEGISLATION

While the MCPAA of 1997 did not survive the 105th congressional session, it, along with other legislation, focused attention on the need for reform. There were four similar acts in Congress that would have specifically made ERISA preemption less viable as a defense against liability in the managed care setting. The four acts that proposed to limit ERISA preemption represent a clear indication that the problem will be addressed through federal legislation in a later session. Because so much legislation is aimed at correcting the confusion that currently exists, it is likely that a measure addressing managed care liability will soon become law.

Senator Edward M. Kennedy introduced the Health Insurance Bill of Rights Act of 1997 ("HIBRA"), on February 27, 1997.¹⁹⁷ In part, this bill would amend ERISA "to establish standards for protection of consumers in managed care plans and other health plans."¹⁹⁸ The HIBRA specifically provides for standard utilization review procedures, protection of confidentiality of patient records, establishment of a grievance procedure, prohibition of gag clauses and other limits on communications between physician and patient, easier access to specialty care, and coverage for emergency visits without pre-authorization.¹⁹⁹ The HIBRA was referred to the Committee on Labor and Human Resources in February 1997 but hearings were not held until May 1998.²⁰⁰ The Congressional session ended without any formal action being taken on the HIBRA.

Representative Charlie Norwood proposed the Patient Access to Responsible Care Act of 1997 ("PARCA"), on April 23, 1997.²⁰¹ Norwood introduced the PARCA as "[a] bill to amend the Public Health Service Act and the Employee Retirement Income Security Act of 1974 to establish standards for relationships between group health plans and health insurance issuers with enrollees, health professionals, and providers."²⁰² Specifically, the PARCA would require health insurance issuers to provide covered services to all enrollees, including full access to emergency and immediate care without prior authorization and access to specialized treatment.²⁰³ The PARCA would regulate utilization review and physician incentive plans that contain cost and limit communications between the

197. S. 373, 105th Cong. (1997).

198. *Id.*

199. *Id.*

200. See S. 373, Bill Tracking Report, 105th Cong. (1997).

201. H.R. 1415, 105th Cong. (1997).

202. *Id.*

203. *Id.*

physician and the patient.²⁰⁴ The PARCA also amends ERISA section 514 so that it no longer preempts state laws dealing with managed care liability.²⁰⁵ The bill had 234 cosponsors in the House.²⁰⁶ On April 24, 1997 Senator Alfonse D'Amato introduced a companion bill in the Senate. D'Amato's bill had four cosponsors.²⁰⁷ Subcommittee hearings were held in the House Subcommittee on Employer-Employee Relations, the House Subcommittee on Health and Environment, and the Senate Committee on Labor and Human Resources, but the legislation died in subcommittee before the end of the congressional session.²⁰⁸

Representative Marge Roukema introduced the Quality Health Care and Consumer Protection Act ("QHCCPA"), in the House on March 21, 1997.²⁰⁹ The QHCCPA is "[a] bill to amend the Employee Retirement Income Security Act of 1974 and the Public Health Service Act to require managed care group health plans and managed care health insurance coverage to meet certain consumer protection requirements."²¹⁰ Roukema's comprehensive legislation attacks managed care organizations and further requires them to cover emergency services, even when not pre-approved, when a "prudent layperson" would assume that immediate medical attention was necessary.²¹¹ The legislation also prohibits the use of physician gag clauses, requires disclosure of physician payment arrangements to all enrollees, imposes restrictions on denying coverage of experimental treatment, provides protection for confidentiality of medical records, and creates a structured grievance procedure.²¹² Similar to the other managed care legislation, the QHCCPA died in subcommittee.²¹³

Representative Charlie Norwood introduced the Responsibility in Managed

204. *Id.*

205. H.R. 1415 § 4(a) provides: "[T]his section shall not be construed to preclude any State cause of action to recover damages for personal injury or wrongful death against any person that provides insurance or administrative services to or for an employee welfare benefit plan maintained to provide health care benefits."

206. H.R. 1415, Bill Tracking Report, 105th Cong. (1997).

207. S. 644, 105th Cong. (1997); S. 644, Bill Tracking Report, 105th Cong. (1997).

208. H.R. 1415, Bill Tracking Report, 105th Cong. (1997); S. 644, Bill Tracking Report, 105th Cong. (1997).

209. H.R. 1222, 105th Cong. (1997).

210. *Id.*

211. *Id.*

212. *Id.* Representative Roukema also stated:

Medical professionals for generations have worked long and hard to give the United States the highest standard of medical care in the entire world. Our physicians, nurses, and medical researchers have performed miracles in combating dreaded disease, repairing ghastly injuries, and correcting infirmities. We cannot allow green-eyeshaddad [sic] bean counters in insurance company accounting departments to throw that progress away. With a health care system that is the envy of the world, we must not allow the United States of America to slip to third world standards of medicine.

143 CONG. REC. E564 (Mar. 21, 1997).

213. See H.R. 1222, Bill Tracking Report, 105th Cong. (1997).

Care Act of 1997 ("RMCA"), on November 8, 1997.²¹⁴ The RMCA is a bill that would amend ERISA "to clarify the preemption of State law by such title with respect to causes of action for damages for personal or financial injury of wrongful death resulting from failures to provide benefits under employee welfare benefit plans providing health care benefits."²¹⁵ The RMCA had sixteen co-sponsors.²¹⁶ Like the MCPAA, the RMCA would increase the liability of managed care organizations by limiting the use of ERISA preemption as a defense against injury and wrongful death.²¹⁷

CONCLUSION

The time has come for reform. The MCPAA, or other similar legislation, could put an end to the confusion courts have created over the application of ERISA preemption. Such legislation would make equitable damages available to all plaintiffs injured by MCOs and heighten the standard of care available by creating a federal right of action holding MCOs liable for their cost containment measures.

Legislation limiting ERISA preemption would protect physicians from unfair lawsuits by making health plans responsible for the constraints they place on providers, creating an incentive for MCOs to engage in responsible treatment decisions, and making equal damages available to those individuals whose health plans are covered by ERISA. Legislation is vital because MCOs should be held liable for inadequate utilization review, as utilization review determines medical appropriateness of treatment or testing for a certain patient. Further, an act like the MCPAA could fill the void federal case law has created with ERISA preemption. Such change could bring uniformity to the field of managed care, a goal ERISA has not achieved. Legislative action would also allow Congress to speak regarding regulation of the managed care industry, an opportunity they did not have when Congress originally passed ERISA, because managed care had not yet entered the health care market with the force that exists today.

Remember Florence, the woman who lost her unborn child because her MCO determined inpatient care was not cost effective? Had the MCPAA, or comparable legislation, been the law when her child died, Florence could have sued her MCO to vindicate her rights. If MCOs are held accountable for their decisions, patient care may replace cost containment as a priority, leading to a better quality of healthcare for America's workforce and their families.

214. H.R. 2960, 105th Cong. (1997).

215. *Id.*

216. *Id.*

217. The RMCA rewrites 29 U.S.C. § 1144(b) to provide that ERISA "shall not apply to any cause of action to recover damages for personal or financial injury or wrongful death against any person that provides insurance or administrative services to or for an employee welfare benefit plan maintained to provide health care benefits." H.R. 2960, 105th Cong. (1997).

PRIVATE POLICE: DEFENDING THE POWER OF PROFESSIONAL BAIL BONDSMEN

HOLLY J. JOINER*

Five masked men enter a Phoenix residence under cloak of night and begin shooting. When the chaos clears, a young couple who had been sleeping in the home is dead. The masked men claim to have been trying to apprehend a bail jumper. The bail jumper, however, did not live there. Though it is later revealed that the men were not legitimately working for a bail bondsman, an old debate has once again been revived.¹ The United States has long struggled with the system of criminal bail and its management. The use of a qualified person as a surety to guarantee the return of a bailed prisoner was accepted in England long before the formation of the United States.² The use of professional bail bondsmen in the U.S. criminal justice system, however, sparks considerable controversy.³

Media and political attention on professional bail bondsmen has focused only on their failures and not on the essential social functions they serve. Sensational stories detailing violence during the recapture of bail jumpers have dominated coverage. Based on this limited perspective, there have been efforts in some states⁴ and in the federal government to limit or eliminate the role of professional bail bondsmen. Hasty efforts to address the perceived problems in the system are unwise and have the effect of decreasing control over bailed defendants.

Part I of this Note discusses the background of the professional bail bonds system and points out some common criticisms of the system. Part II addresses professional bail bondsmen and their valuable role in the criminal justice system, advocating a private, profit-driven bail bonds process. Part III addresses the need to have broad powers for professional bail bondsmen in order that they may continue to perform the many socially desirable tasks that they currently serve. Reducing the power of bail bondsmen only decreases the ability of defendants to make bail and secure release from jail. Additionally, the profitability and even the existence of the professional bail bonds system would be jeopardized. These

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1. See David D. Minier, *Bounty Hunters Currently the Target of Much Misplaced Outrage*, FRESNO BEE, Sept. 28, 1997, at B7. Mr. Minier is a Chowchilla Municipal Court judge. See *id.*

2. See Peggy Tobolowski & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 (1993). A reputable person was qualified to serve as the surety. Typically, however, the surety was a relative or friend of the defendant. See *id.*

3. The rights and liabilities of bail bondsmen discussed in this Note also apply to agents of bail bondsmen commonly called bounty hunters, skip tracers, bail enforcement agents, and bail enforcement officers.

4. See MICHAEL D. KANNENSOHN & DICK HOWARD, *BAIL BOND REFORM IN KENTUCKY AND OREGON* (1978). Oregon and Kentucky have prohibited the use of professional bail bondsmen, and have instead adopted a system requiring defendants to either personally produce a percentage of the bail or find a relative who will pay a percentage of the bail to secure release. See *id.* at 5, 14.

disadvantages outweigh the advantages of changing the long-established power of sureties.

I. BACKGROUND OF THE PROFESSIONAL BAIL BONDS SYSTEM

A. History

The system of bail originated in medieval England as a way to free prisoners before trial.⁵ "Bail literally meant the bailment or delivery of an accused to jailors of his own choosing."⁶ The decision to grant bail was within the discretion of the local sheriff who could take the word of the accused that he would return or could require that an acceptable third party vouch for the defendant.⁷ By the Thirteenth Century, the granting of bail was regulated by law and only certain offenses were bailable.⁸ Third parties continued to serve as sureties, and the law required them to either surrender money⁹ or themselves¹⁰ if the defendant did not return to face judgment. The sheriff granted the surety custody over the accused, which the law viewed as a continuation of imprisonment though outside the jail.¹¹ This gave sureties broad power to regulate the activity of the accused.

Sureties were typically landowners who were friends or relatives of the accused because local sheriffs considered them capable of taking custody.¹² The fact that a defendant could produce a local landowner to guarantee his return at the time of trial was sufficient insurance against flight. Additionally, life in English society at that time did not often involve travel, and most defendants were without means to flee or places to go.¹³ Defendants rarely fled because of the custodial powers of the surety, and because effective social control was maintained through personal relationships among the sheriff, the accused, and the

5. See DANIEL J. FREED & PATRICIA M. WALD, *BAIL IN THE UNITED STATES*: 1964, at 1 (1964).

6. *Id.*

7. *See id.*

8. *See* Statute of Westminster, 1275, 3 Edw. 1, ch. 15 (Eng.). The Statute of Westminster regulated discretionary bail power of local sheriffs in an attempt to avoid corruption. Sheriffs with complete discretionary power were known to extort money from prisoners or sureties. *See* FREED & WALD, *supra* note 5, at 1.

9. *See* FREED & WALD, *supra* note 5, at 1.

10. Sureties could be made to suffer the penalty that the accused would have suffered if the accused failed to appear and the surety could not produce him. *See* FREED & WALD, *supra* note 5, at 1; 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 590* (2d ed. 1923).

11. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 70 (1977).

12. *See* FREED & WALD, *supra* note 5, at 1.

13. *See id.* at 1-2.

surety.¹⁴ Both the sheriff and the surety had custodial rights over the accused,¹⁵ and therefore, either could apprehend an escaped defendant¹⁶ using any reasonably necessary means.¹⁷

The American system of bail was originally similar, though not identical, to its English predecessor. Stopping short of guaranteeing a right to bail, the U.S. Constitution only guards against excessive bail.¹⁸ The right to bail was secured by federal law in the Judiciary Act of 1789,¹⁹ which required bail for offenses not punishable by death.²⁰ Most states incorporated a right to bail into their constitutions or passed statutes guaranteeing bail.²¹ The guarantee of bail in most states mirrors the federal law.²²

Over time, America outgrew the traditional bail system. Rapid population growth made it less likely that a sheriff or judge would be personally acquainted with either the defendant or the surety. The criminal justice system needed a new way of finding and evaluating sureties to enable the bail system to function as intended.²³

As a result, the institution of the bondsman arose to take over the function of posting bail. In return for a money premium, he guaranteed the defendant's appearance at trial. In the event of nonappearance, the bondsman stood to lose the entire amount of his bond. Selling bail bonds became a thriving commercial adjunct to the judicial function of setting bail.²⁴

While sureties were changing, early American courts did not change their views as to the rights of the surety. By stepping forward as surety, the bondsman took "custody" of the defendant. U.S. courts continued to view bail as imprisonment outside the jail, and therefore, custodial rights also remained

14. The sheriff was likely to know everyone in town, and this provided an additional incentive to honor the commitment to appear because hiding was infeasible. *See id.* at 2.

15. *See id.* at 1.

16. *See Herman v. Jeuchner*, 15 Q.B.D. 561 (1885).

17. Reasonable means included apprehension in the middle of the night, on Sundays, or inside the home. *See Duker, supra* note 11, at 71-72.

18. The Eighth Amendment states that: "Excessive bail shall not be required." U.S. CONST. amend. VIII.

19. 1 Stat. 73, 91 (1789).

20. The Judiciary Act of 1789 made bail in capital cases discretionary depending on the "nature and circumstances of the offence [sic], and of the evidence, and usages of law." *Id.*

21. *See FREED & WALD, supra* note 5, at 2-3 & n.8.

22. Some states provide for rights different than the federal law. Indiana, Michigan, Nebraska and Oregon limit the power to deny bail to treason and murder. Georgia, Maryland, and New York grant an absolute right to bail only in misdemeanor cases. Massachusetts, North Carolina, Virginia, and West Virginia allow almost complete discretion to judges in almost all cases. *See FREED & WALD, supra* note 5, at 2 n.8.

23. *See id.* at 2-3.

24. *Id.* at 3.

largely the same. Certain rights accompanied the responsibility of custody including the right to surrender the defendant at any time before trial, thereby releasing liability,²⁵ the right to apprehend a fleeing defendant,²⁶ and the ability to exercise those rights at any time.²⁷

By acting as surety, not only did the bondsman have the right to exercise the privileges of custody, but he also had a duty to deliver the defendant to trial or face forfeiture.²⁸ This duty was similar to the duty of early sureties in England who were required to turn themselves in or to forfeit money and land if the accused did not appear.

Initially, the use of professional bail bondsmen was a compromise between the need to have acceptable sureties and the importance of bail. The inability of a judge to ascertain the reliability of sureties he did not know threatened to undermine the entire system of bail. Professional sureties helped solve this problem because their fitness as a surety could be evaluated once by the court, and they could then serve many defendants. Though it was not and is not a perfect solution, it allowed the bail system to continue.

Even though bail is not guaranteed by the U.S. Constitution, it has long been considered too important a right to be abandoned.

From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.²⁹

B. Criticisms of the Professional Bail Bonds System

The use of professional bondsmen and the changes it brought caused and

25. See, e.g., *State v. Lingerfelt*, 14 S.E. 75, 77 (N.C. 1891) (recognizing the right of the bondsman to arrest the defendant before trial if the bondsman feels there is a risk of nonappearance).

26. See, e.g., *Parker v. Bidwell*, 3 Conn. 84 (1819) (stating that a bondsman may catch and detain prisoners as he pleases); *Respublica v. Gaoler*, 2 Yeates 263, 264 (Pa. 1798) (recognizing the right of a bondsman to cross state lines to seize a defendant). See also Annotation, *Surrender of Principal by Sureties on Bail Bond*, 73 A.L.R. 1369 (1931).

27. See, e.g., *Reese v. United States*, 76 U.S. 13 (1869) (stating that the principal is within the custody of the surety, and the surety can surrender or apprehend him at any time); *Nicolls v. Ingersoll*, 7 Johns. 145, 155 (N.Y. 1810).

28. See *Taylor v. Taintor*, 83 U.S. 366 (1872) (stating that the bondsman is obligated to return the defendant); *Clark v. Gordon*, 9 S.E. 333 (Ga. 1889) (stating that the bondsman has a duty to catch and return the defendant to escape liability on the bail bond).

29. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citations omitted).

continue to cause considerable debate. Today's critics of the private bail bonds system contend that with the prevalence of professional sureties there is little incentive for defendants to return for trial because it is not the defendant's or his family's money at stake.³⁰ A defendant typically pays a fee to the bail bondsman equal to ten percent of the amount of bail,³¹ and this fee is nonrefundable so it cannot provide a financial incentive to return.

The theory behind money bail is simple: "It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release." However, "under the professional bondsman system the only one who loses money for nonappearance is the professional bondsman, the money being paid to obtain the bond being lost to the defendant in any event."³²

Additionally, the defendant and the bail bondsmen have only a contractual relationship, not a personal one. Privatization of suretyship arguably sacrificed family influence, a convenient source of social control.³³ Bail bondsmen and defendants meet briefly at the time of contracting and may have periodic contact, but the fear of harming the wealth of the defendant's family is no longer a significant deterrent to jumping bail because it is the professional bail bondsman whose money will be subject to forfeiture, not the defendant's family or friends' money.

Professional sureties are also criticized for disadvantaging the poor who cannot afford the bondsman's fee. "In a system which grants pretrial liberty for money, those who can afford a bondsman go free; those who cannot, stay in jail."³⁴ While this seems to be more of an indictment of the entire idea of monetary bail, arguably bail bondsmen have a significant amount of control over who stays in jail and who is released.³⁵

A bail bondsman has complete discretion as to which clients he accepts and which he does not. Some critics of professional bail bondsmen believe that too much control lies outside the reach of the court.

30. See *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring) (reasoning that with a professional bondsman, the defendant has no personal stake and is less likely to take the responsibility seriously).

31. See Mary A. Toberg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141, 142 (1983).

32. *Pugh v. Rainwater*, 557 F.2d 1189, 1199 (5th Cir. 1977) (quoting *Bandy v. United States*, 81 S. Ct. 197, 197 (1960); *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring)).

33. Bail bondsmen have, however, developed methods to exert social control over their clients after those clients are released from jail. See *infra* Part II.B.

34. *Pugh*, 557 F.2d at 1196 (quoting FREED & WALD, *supra* note 5, at 21).

35. The system of setting bail can in and of itself seem to disadvantage the poor who must pay someone to be released before trial, be it bail bondsman or the courts. See *Bandy*, 81 S. Ct. at 198. "[I]n the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Id.*

The extent to which the accused is financially committed to appear is determined by the amount of collateral the bail bondsman requires for writing the bond. The ultimate effect of such a system . . . is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsman's judgment, and the ones who are unable to pay the bondsman's fee, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.³⁶

While most bail bondsmen use logical criteria such as community ties, family, and employment to evaluate a prospective client, some bondsmen use instinct or other less desirable criteria.³⁷ As a private party, the bondsman is free to refuse any client for nearly any reason. Critics have accused bondsmen of refusing to work with defendants whose bail is small based on the fact that the profit would be small.³⁸ This can work to disadvantage the poor who can neither pay the small amount of bail nor contract with a bail bondsman to secure release.

By far the most criticism comes from those who oppose the ability of professional bail bondsmen to exercise powers of custody. To protect his investment, a professional bondsman can surrender a defendant at any time and can apprehend a fleeing defendant using "reasonable means necessary to effect rearrest."³⁹ Highly publicized incidents of violence, such as a shooting in Phoenix,⁴⁰ and the glamorization of television⁴¹ dominate the popular view of bail

36. *Pugh*, 557 F.2d at 1199.

37. See FREED & WALD, *supra* note 5, at 33. Bondsmen have been known to make decisions about which clients they will take based on instinct about the defendant's character or based on the type of crime with which a defendant is charged. For example bail bondsmen have avoided narcotics defendants because they don't wake up early enough in the day to make it to court, prostitutes because they have no community roots, forgers because they travel around too much. See *id.*

38. See *id.*; but see *infra* Part II (discussing the advantages of the profit motive).

39. *Lopez v. McCotter*, 875 F.2d 273, 277 (10th Cir. 1989).

40. See, e.g., Stacy H. Adams, *Bounty Hunter from Hopewell Gets 18 Years*, RICHMOND TIMES-DISPATCH, Dec. 20, 1994, at B5 (stating that bounty hunters kicked a handcuffed defendant and pulled his gold tooth out with pliers); Paula Barr, *Force, Authority of Bounty Hunters Come into Question*, TIMES-PICAYUNE, Jan. 4, 1995, at A2 (reporting that two children were maced during an arrest by a bounty hunter); Donald Bradley, *More Than Fugitives Fear Bounty Hunters*, KANSAS CITY STAR, Feb 21, 1993, at B1 (stating that bystanders were injured during high speed chase of defendant by bounty hunters); Peter Hermann, *Bondsman Shoots Man in Chase*, BALTIMORE SUN, July 8, 1995, at B2 (reporting that bondsman shot a fleeing man); John Woolfolk, *Bounty Hunters Get Wrong Guy*, S.F. CHRONICLE, Dec. 15, 1993, at C3 (stating that bounty hunters arrested the former classmate of a defendant).

41. For example, *Bounty Hunters* (Fox Television broadcast), lets viewers ride along as professional bondsmen and their bail recovery agents attempt to apprehend bail jumpers. Additionally, the 1980 movie, *The Hunter* starring Steve McQueen as legendary bounty hunter

bondsmen, who are widely seen as ruthless bounty hunters.

C. States Increasingly Rely on the Private Sector

Despite the criticisms of professional bondsmen, states, straining under the increasing cost of law enforcement, are relying heavily on these private actors to help keep the criminal justice system functioning. Political pressure to “get tough” on crime has led to the need for more law enforcement action and more jails and prisons. There has also been a substantial price tag. In 1994, *U.S. News and World Reports* estimated that the annual cost of crime in the United States totaled approximately \$674 billion.⁴² The cost to house one jail inmate has been estimated at \$17,000 per year.⁴³ This country spends \$60,000 for each police officer on the street.⁴⁴ The skyrocketing cost of crime has led many states to rely on the private sector to carry out functions traditionally performed by the states.⁴⁵ More and more police are relying on bail bondsmen to shoulder the responsibility to find those who jump bail and return them to the court.

II. PROFESSIONAL BAIL BONDSMEN SERVE VITAL SOCIAL FUNCTIONS

As a private individual,⁴⁶ the bondsman does not necessarily set out to perform a public service,⁴⁷ but instead sets out to make a living. The result,

Ralph “Papa” Thorson glamorized bail enforcement. *THE HUNTER* (Warner Bros. 1980).

42. Sara Collins, *Cost of Crime: \$674 Billion*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 40.

43. See Lynn S. Branham, *A Federal Comprehensive Community-Corrections Act: Its Time Has Come*, 12 COOLEY L. REV. 399, 403-04 (1995).

44. See Todd R. Clear, “*Tougher*” is Dumber, N.Y. TIMES, Dec. 4, 1993, at A2.

45. See Philip E. Fixler Jr. & Robert W. Poole Jr., *Can Police Services be Privatized?*, 498 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 109 (1988) (discussing the push to privatize police services); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 42 (1995) (discussing financial troubles of U.S. cities and the growing view that privatization is the answer); Larry Carson, *Plan Afoot to Privatize Police Jobs*, BALTIMORE SUN, Jan. 17, 1994, at B1 (discussing the nationwide move toward privatization of police services and one county’s plans to join in).

46. There have been many efforts to have professional bail bondsmen declared state actors for the purposes of requiring their compliance with Fourth Amendment guarantees and subjecting them to liability under 42 U.S.C. § 1983. See *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200 (5th Cir. 1996) (holding that the fact that there was an arrest warrant issued for the defendant does not make a bondsman who apprehends the defendant a state actor); *Ouzts v. Maryland Nat’l Ins. Co.*, 505 F.2d 547 (9th Cir. 1974) (holding that purely private conduct such as the actions of a bail bondsman do give rise to a cause of action under 42 U.S.C. § 1983); *State v. Tapia*, 468 N.W.2d 342 (Minn. Ct. App. 1991) (stating that a bondsman has the same power to arrest others as a private citizen).

47. For a discussion of the bondsman as a state actor, see *infra* notes 131-48 and accompanying text. See also Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731 (1996); Emily

however, is something of a private police force that chases defendants who flee and delivers them back to court.

The bail bondsman's solicitation of business from criminals and constant contact with the criminal element has led to the misconception that the professional bondsman is somehow corrupt or shady.⁴⁸ The bondsman has been described as "an unappealing and useless member of society . . . [who] lives on the law's inadequacy and his fellowman's troubles."⁴⁹ A more accurate view, however, is that professional bail bondsmen, through the normal course of business, perform a variety of important social functions.

A. More People Are Able to Make Bail

Not the least of these functions is providing a way for accused persons to be free until trial.⁵⁰ One New York judge defended solicitation of business by bondsmen saying:

There is a general misconception . . . that solicitation of business by bondsmen is illegal. It is entirely lawful—just as lawful as solicitation by life insurance agents. . . .

It is even necessary and desirable that this should be so—under proper regulation. Otherwise the casual offender, the inexperienced offender, the offender charged with minor crimes, would be confined in jail while the professional criminal with his outside contacts, experienced little difficulty in arranging bail. In this [c]ourt . . . I have found many defendants ignorant of the fact that bail has been fixed by the magistrate, ignorant of the amount of bail fixed and the method and cost of obtaining release on bail. And it is generally the minor or low bail offender, whose even temporary detention is not justified by the crime charged, who finds himself in that predicament. It is most desirable that this class of offender should be solicited and bailed.⁵¹

Bail bondsmen provide a way for the average citizen to secure enough money to

M. Stout, *Bounty Hunters as Evidence Gatherers: Should they be Actors Under the Fourth Amendment When Working With the Police?*, 65 U. CIN. L. REV. 665 (1997); Gregory Takacs, *Tyranny on the Streets: Connecticut's Need for the Regulation of Bounty Hunters*, 14 QUINNIPAC L. REV. 479 (1994).

48. See FREED & WALD, *supra* note 5, at 34-35.

49. RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 102 (1965).

50. See *supra* notes 23-29 and accompanying text (discussing the importance of bail). The presumption of innocence prohibits punishment before conviction and the opportunity to be free before conviction is extremely important. Bail can only be used as a way to secure appearance for trial and not as a means to punish. See *Duran v. Elrod*, 542 F.2d 998 (7th Cir. 1976); *State v. Midland Ins. Co.*, 494 P.2d 1228 (Kan. 1972). Freedom before trial helps the defendant prepare his defense. See *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

51. *People v. Smith*, 91 N.Y.S.2d 490, 494 (1949).

be released.⁵² Although a privatized bail bonds system has been criticized for keeping the poor in jail, in reality, professional bail bondsmen help more people to avoid jail, which serves the needs of the defendant, the state budget, and the bail bondsman.⁵³ The plight of the indigent defendant is in no way served by decreasing the power of the bail bondsman to solicit and serve defendants. Without professional bail bondsmen, the problems of the poor and inexperienced would be made worse by the fact that they would be required to produce the full amount of bail.

The willingness of a bail bondsman to post a bond for a particular defendant can even affect the amount of bail set in that defendant's case.⁵⁴

The bondsman plays no formal part in this process, either. In many cases of this kind, the defendant or his attorney may contact a bondsman before the bail hearing and the bondsman may supply informal advice to the judge or the prosecutor concerning his willingness to post bail for the defendant. This may help the defendant by inducing the judge to set bail at a level which the defendant can afford. It can hardly work to the defendant's disadvantage.⁵⁵

Without this service, it is likely that many defendants would not be able to make

52. The court does have the authority however to refuse to allow a surety to post bond for a defendant if the court has reason to doubt the willingness or ability of the surety to produce the defendant. *See American Druggist v. Bogart*, 707 F.2d 1229, 1233 (11th Cir. 1983).

53. *See* Toberg, *supra* note 31, at 44; *see also infra* Part II.E.

54. The main factors considered by judges in determining whether bail is appropriate in a case are set by the Bail Reform Act of 1984, 18 U.S.C. § 3142(g) (1994):

The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law. . .

55. Forrest Dill, *Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Courts*, 9 LAW & SOC'Y REV. 639, 653 (1975). Mr. Dill, however, rejects the idea that bondsmen are "purveyors of freedom" who decide which defendants will be released and which will not. That type of view exaggerates the influence that bondsmen have over the bail decision. *See id.* at 652.

bail at all.⁵⁶ The bondsman is able to evaluate a potential client's likelihood of nonappearance with an eye on his profit. He is not bound by statutes or guidelines, like the court system, and can help society by evaluating the risk of flight.

B. Social Control

Bail bondsmen play an important role in maintaining social control over bailed defendants. The bondsman and the defendant form a contract in which the bail bondsman agrees, for a fee,⁵⁷ to act as the defendant's surety.⁵⁸ In addition to paying the fee, the defendant agrees to appear in court for all scheduled appearances. The bondsman only makes a profit when he is able to collect fees from the defendant and avoid paying the amount of the bond to the court. Just as the traditional English surety, usually a family member, had a personal incentive to encourage the defendant to appear, so does the professional bail bondsman. His business depends on the appearance in court of his clients.

There is, of course, risk that the defendant will sign the contract with the bondsman, secure release and leave the jurisdiction or refuse to appear in court.⁵⁹ To protect his investment, the bondsman must be thorough not only in assessing the risk of flight before writing the bond,⁶⁰ but in keeping tabs on the defendant after the bond is written. "The profit motive is presumed to insure diligent attention to his custodial obligation."⁶¹

When entering the contract with the defendant, the bondsman may require that a third party, such as a friend or relative, cosign or post collateral.⁶² The advantage to the bail bondsman is two-fold. First, in the event of nonappearance, the bondsman can try to recover costs from the third party. Second, the involvement of friends and family makes it easier for the bondsman to influence the actions of the defendant and keep tabs on him or her.⁶³ Requiring a friend or family member to accept liability helps to provide an incentive for the defendant

56. See El Franco Lee, *Leave Harris County's Poor in Jail Without Bail Bonds?*, HOUSTON CHRON., June 26, 1994, at E1 (stating that county records showed that in Harris County, Texas 77,553 defendants were released using a bail bond in one year).

57. Usually 10% of the amount of bail. See *supra* notes 31-32 and accompanying text.

58. The bondsman posts a bond for the full bail amount with the court that does not come due until a set time after the court date of the defendant's case. If the defendant appears in court as scheduled, the bondsman is released from liability on the bond and makes a profit from the fee already collected. See Toberg, *supra* note 31, at 142.

59. Defendants accused of more serious crimes carrying long prison sentences are more likely to jump bail when they feel that being a fugitive is more attractive than facing prison. See Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 J. LEGAL STUD. 381, 382 (1981).

60. See *supra* notes 37-38 and accompanying text (discussing the factors bondsmen consider when deciding whether or not to contract with a particular defendant).

61. FREED & WALD, *supra* note 5, at 22.

62. See Toberg, *supra* note 31, at 142.

63. See *id.*

to meet his legal and contractual obligations.⁶⁴ The bondsman is able to achieve a greater degree of social control over the defendant. From the oldest system of bail to the present, the main idea of a surety assumes that a defendant required to account to another for his actions will be more likely to honor his obligations.

C. Bail Bondsmen Help Courts Run Smoothly

In an effort to ensure appearance, the bondsman provides a variety of useful services to his clients, which in turn help the courts to run smoothly. Services designed to take the fear and guesswork out of court appearances help ensure that bailed defendants will appear, which helps the courts avoid wasted time and expense.

Many bondsman mail reminders of future court dates to defendants, call them the day before court, or require them to telephone the office periodically, although some consider periodic contact unnecessary. A bondsman may also notify a bond's cosigners of the defendant's next court appearance, so that they can help ensure the appearance of the accused at the proper time.⁶⁵

Bondsmen provide the defendants they serve with important details about their court appearances such as when to arrive, which courtroom to report to, how to find that courtroom, and what kind of proceeding will occur.⁶⁶ This helps to avoid nonappearance through mistake, forgetfulness or fear of the unknown.⁶⁷

Bondsmen can also clear up administrative mistakes made by the courts, such as a defendant scheduled to appear in two courtrooms at the same time. A bondsman is familiar with the operation of the court system and is able to catch errors and bring them to the attention of the court before problems occur.⁶⁸ The bail bondsman's knowledge of the system and ability to act as a liason between the court and the accused serves all involved.

While bondsmen are unable to give legal advice, they can give defendants important information on how to hire a lawyer⁶⁹ and can encourage a defendant to cooperate with a lawyer's advice.⁷⁰ They can also explain the meaning and importance of legal procedures, types of actions, and can encourage a defendant to carefully make legal decisions.⁷¹ Advice concerning lawyers, legal options,

64. See *supra* notes 30-35 and accompanying text (discussing incentive problems caused by the lack of a personal relationship between the defendant and the professional bail bondsman).

65. Toberg, *supra* note 31, at 142.

66. See Dill, *supra* note 55, at 654-55.

67. See *id.* at 655.

68. See *id.* at 656; see also Toberg, *supra* note 31, at 143.

69. Attorneys can also help the bondsman by referring clients to a bondsman the attorney knows and has worked with before. See Dill, *supra* note 55, at 648.

70. See *id.* at 655.

71. Bail bondsmen may, however, have a greater interest in encouraging defendants to plead guilty because that would decrease the time that the defendant is free on bond. The chances of

and legal decisions helps a defendant to navigate his way through a sometimes unfriendly and confusing criminal justice system. By acting as liaison, the bail bondsman helps the court to avoid delays caused by a defendant's errors and confusion.

In addition to providing information to defendants, bail bondsmen supply information to court officials and attorneys about the defendant. This allows the courts to run more smoothly. The bondsmen act as liaison between the court and the defendant, helping each obtain needed information about the other.⁷² In exchange, the courts and the state help the bondsmen to operate more profitably through lenient local rules regarding bonding.⁷³

*D. Desire to Avoid Forfeiture Leads to Effective
Apprehension of Bail Jumpers*

Profit is the driving force behind the thorough service bondsmen provide. The ability to make a profit depends on avoiding forfeiture, which provides a deterrent to poor service. The bondsman's profit comes from the fee, equal to ten percent of the bail amount, which he collects from the defendant at the time of contracting. If a defendant fails to appear, the bondsman stands to lose up to 100 percent of the amount of bail, which means that not only does the ten percent profit disappear, but the bondsman must pay the other ninety percent out of pocket.⁷⁴

For example, if a defendant's bail was set at \$2000, the bondsman would collect a fee and possible profit of \$200 to write the bond. If the defendant does not appear and the bondsman is unable to return that defendant to the court, the bondsman must give up the \$200 and also produce \$1800 to cover the bond.

Forfeiture in the federal courts is covered by Federal Rule of Criminal Procedure ("Rule") 46(e)(1), which mandates bail forfeiture when a defendant breaches a condition of his release, such as failing to appear.⁷⁵ There are typically two steps to a forfeiture proceeding. First, in accordance with Rule 46(e)(1), the district court declares the forfeiture when the defendant fails to appear⁷⁶ or in some other way breaches the conditions of his bail, such as committing a crime.⁷⁷ Second, the surety becomes a debtor to the government

nonappearance decrease, and the bondsman is more likely to make a profit. *See id.* at 656.

72. *See* Toberg, *supra* note 31, at 143.

73. *See id.* at 144.

74. *See* Liz Dupont-Diehl, *Bail Bondsmen Fill the Gap in the Criminal Justice System*, J. INQUIRER (Manchester, Conn.), Mar. 29, 1993.

75. FED. R. CRIM. P. 46(e)(1).

76. Notice of nonappearance need not be given to the surety because the surety is presumed to know the whereabouts of the defendant. *See* *United States v. Minnesota Trust Co.*, 59 F.3d 87, 90 (8th Cir. 1995); *American Druggist Ins. Co. v. Bogart*, 707 F.2d 1229, 1235 (11th Cir. 1983); *United States v. Vera-Estrada*, 577 F.2d 598, 600 (9th Cir. 1978); *United States v. Marquez*, 564 F.2d 379, 381 (10th Cir. 1977).

77. *See* *United States v. Gigante*, 85 F.3d 83, 85 (2d Cir. 1996); *United States v. Dudley*,

and must pay after the order of forfeiture is entered.⁷⁸ Modern individual bail bondsmen are usually backed by a surety insurance company,⁷⁹ which maintains funds sufficient to cover forfeitures,⁸⁰ but losses can still be devastating to the individual bail bondsman who must pay insurance premiums.⁸¹

Forfeiture is not always absolute, and can be set aside in rare circumstances. Rule 46(e)(2) provides that “[t]he court may direct that a forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.”⁸² The court has “wide discretion” in setting aside a forfeiture judgment,⁸³ and the surety must prove that “an injustice is done by the forfeiture.”⁸⁴

When deciding whether or not to set aside a forfeiture judgment, the court considers several factors⁸⁵ including: (1) the willfulness of the defendant’s breach of his bond conditions; (2) the participation of the sureties in apprehending the defendants;⁸⁶ (3) the cost, inconvenience, and prejudice suffered by the government as a result of the defendant’s breach; (4) any explanation or mitigating factors; (5) whether the sureties were professionals or friends and family of the defendant;⁸⁷ and (6) the appropriateness of the amount

62 F.3d 1275, 1277-78 (10th Cir. 1995); *Unites States v. Vaccaro*, 51 F.3d 189, 191-92 (9th Cir. 1995); *United States v. Patricia*, 948 F.2d 789, 793-94 (1st Cir. 1991); *United States v. Santiago*, 826 F.2d 499, 506-07 (7th Cir. 1987); *United States v. Dunn*, 781 F.2d 447, 449-50 (5th Cir. 1986).

78. In most jurisdictions, forfeiture occurs at a graduated rate where the surety is only required to pay a small percentage of the bail amount at first, then more and more as time goes by. *See* FREED & WALD, *supra* note 5, at 28.

79. *See id.* at 23. Most modern courts will not consider a bail bondsmen an acceptable surety unless he is backed by an insurance company. *See id.* Bail bondsmen used to be individual entrepreneurs with fairly scant resources, but that method of operation is a thing of the past. *See* Dill, *supra* note 55, at 645.

80. *See* FREED & WALD, *supra* note 5, at 23. Although they insure bail bondsmen against loss, insurance companies do not control the actions of the bondsmen any more than an auto insurance company can control the way insured motorists drive. *See* Dill, *supra* note 55, at 646.

81. Some bail bondsmen try to soften the blow of forfeiture by building up a buffer fund from which they can pay part of the forfeiture, thus relieving some obligation of the insurance carrier. This helps to keep premiums lower. *See* Dill, *supra* note 55, at 645; Interview with Joyce Carlson, Managing General Partner, State Bonding, Indianapolis, Ind. (Oct. 30, 1997).

82. FED. R. CRIM. P. 46(e)(2).

83. *United States v. Amwest Surety Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995); *United States v. Gil*, 657 F.2d 712, 715 (5th Cir. 1981); *United States v. Stanley*, 601 F.2d 380, 382 (9th Cir. 1979); *United States v. Hesse*, 576 F.2d 1110, 1114 (5th Cir. 1978).

84. *Gil*, 657 F.2d at 715; *see also* *United States v. Nolan*, 564 F.2d 376 (10th Cir. 1977).

85. *See* *United States v. Frais-Ramirez*, 670 F.2d 849, 852 (9th Cir. 1982). The factors are not a checklist and are to be weighed as the judge sees fit. *See Amwest Surety Ins. Co.*, 54 F.3d at 603.

86. *See infra* notes 89-96 and accompanying text.

87. *See* *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978).

of the bond.⁸⁸ The burden on the surety is difficult to meet, and, as a result, forfeitures are rarely set aside, especially for professional sureties like bail bondsmen who are well aware of the risk involved.

If a defendant does jump bail, the best course of action for a bail bondsman is to quickly find and return that defendant to the court. The faster the defendant can be apprehended, the less money the bondsman will lose.

Bail bondsmen have a distinct advantage over police officers in finding bail jumpers. The bondsman does nothing but deal with bail, therefore he has time to track down a fleeing defendant and has the resources with which to do it.

This difference in retrieval authority for bondsmen and public officials, combined with the scarce resources available in many jurisdictions for serving warrants, creates an incentive for law enforcement officers to rely on bondsmen as much as possible to return defendants to court. Such reliance on bondsmen effectively transfers part of the costs of fugitive retrieval from the publicly funded criminal justice system to the privately funded bond system.⁸⁹

Additionally, since most bondsmen keep track of the whereabouts of their clients while the clients are out on bail, the bondsman is more likely to find the defendant quickly. Most defendants who do not appear simply forgot their court dates, could not get to the courthouse because of transportation problems or illness, or misunderstood their attorneys and believed that they did not have to appear that day.⁹⁰ Most return to court with a phone call eliminating the expense of sending police to rearrest them.⁹¹ The desire to minimize monetary loss drives the bondsman to respond quickly, and the defendant returns to court without serious loss to the sureties, expense to the state, or additional penalties for the defendant.

Even some defendants who deliberately fail to appear can be quickly found and talked back into court.⁹² If a third party, such as a friend or relative, cosigned the bond, the bondsman will try to use that person to help locate the defendant and talk him or her into appearing. The third party's personal relationship comes in handy for the bondsman who can gather information about where the defendant would likely run and who would help him. Armed with this information, the bondsman begins to "skip trace" or try to trace the movements of the defendant.⁹³ With the resources and time to find defendants who jump bail, bail bondsmen have an impressive success rate for apprehension. Bondsmen or their agents apprehend between eighty-seven and ninety-nine

88. See *United States v. Mizani*, 605 F.2d 739, 740 (4th Cir. 1979).

89. Toberg, *supra* note 31, at 143.

90. See *id.* at 142.

91. See *id.*

92. See *id.*

93. Many bondsmen hire professional skip tracers and bounty hunters for this work, although some bondsmen locate bail jumpers themselves.

percent of all bail jumpers.⁹⁴ The police only apprehend approximately ten percent, usually during traffic stops.⁹⁵ A small percentage of bail jumpers are never caught.⁹⁶ The odds, however, are in favor of getting caught.⁹⁷ The result is that fewer criminals are running free, possibly committing more crimes, while police are unable to locate and catch them.

Incidents involving violence during apprehension, while highly publicized and debated, are actually infrequent according to Bob Burton who heads the National Institute of Bail Enforcement in Tucson, Arizona, an institute set up to properly train bail bondsmen and their agents.⁹⁸ In 1996, "there were fewer than [twenty] 'incidents' of false arrest, unlawful entry, or misuse of firearms."⁹⁹ Burton noted that law enforcement agencies cannot claim as good a record.¹⁰⁰

A deterrent to excessive behavior is the knowledge that although bail bondsmen cannot be sued as state actors, they can be sued as private individuals.¹⁰¹ When bondsmen use unreasonable means, they are subject to civil liability just as any other regular citizen would be. Although the U.S. courts have consistently upheld the right of a bondsman to exercise custodial rights, courts are willing to acknowledge when a bondsman has crossed the line.¹⁰²

E. Decreases Costs for State

One of the most substantial advantages to enforcement of bail provisions in the private sector is cost. Taxpayers, who are already shouldering the rising cost of crime and law enforcement,¹⁰³ are not required to foot the bill for apprehension

94. See Marc Gunther, *Experts on Call: They're in the Book and They Thrive On Public Attention*, CHI. TRIB., Nov. 7, 1993, at 4; Minier, *supra* note 1, at B7; Roy Rivenburg, *Hunting for Humans*, L.A. TIMES, Aug. 8, 1993, at E7. There were approximately 23,000 apprehensions in 1996. See Minier, *supra* note 1, at B7.

95. See Minier, *supra* note 1, at B7.

96. See *id.*

97. The private bail bonds system has a 0.8% fugitive rate, while a public bail bonds system that relies on police officers for enforcement has an 8% fugitive rate. See Charles Oliver, *Nat'l Issue*, INVESTOR'S BUS. DAILY, May 12, 1994, at 1.

98. See Minier, *supra* note 1, at B7.

99. *Id.*

100. See *id.*

101. See *id.*

102.

[W]henever a bondsman takes undue advantage of his justly granted and needed authority in violation of his duty to the granting court and such undue advantage results in injury or damage to his principal or another party, that bondsman should and will be rendered liable for any damage caused as a result of an act which would render liable any other person who was not vested with such authority.

McCaleb v. Peerless Ins. Co., 250 F. Supp 512, 515 (D. Neb. 1965).

103. See *supra* notes 42-45 and accompanying text.

of bail jumpers.¹⁰⁴ This allows state resources to be used for other purposes such as education, crime prevention, and state debt reduction. To protect his profit, the bondsman will be vigorous in tracking down defendants and returning them to justice at little or no cost to the state.

The close eye that bondsmen are able to keep on defendants can help judges make the decision to allow bail instead of sending a defendant to jail.

Additionally, bondsmen diffuse responsibility for the release of defendants. By setting bail, a judge shares the responsibility for a defendant's release with both the bondsman and individuals who become parties to the bond, such as the defendant's relatives or friends, who may cosign the bond or provide collateral for it. This furnishes the judge with a "buffer" against any adverse publicity that may arise, if a defendant commits a heinous crime prior to trial.¹⁰⁵

Every defendant who does not go to jail saves the taxpayers approximately \$1600 per month.¹⁰⁶ Because the average time in jail between arrest and trial is eight months, the savings are substantial.¹⁰⁷

The cost to apprehend bail jumpers is effectively shifted from the taxpayers to the private sector almost completely. Thus, police manpower and state resources can be devoted to other uses. Decreasing the power of bail bondsmen would shift the cost back, requiring taxpayers to shoulder the responsibility. With the considerable costs of crime and law enforcement that already burden taxpayers,¹⁰⁸ a system that allows the private sector to defray some of the cost is prudent.

III. PROFESSIONAL BAIL BONDSMEN NEED SPECIAL AUTHORITY

Sureties traditionally have had special rights arising from custody of the accused. Critics of the professional bail bonds system argue that the old idea of custody is outdated and inapplicable to modern sureties who have no personal relationship to the principal (the defendant).¹⁰⁹ Some advocate prohibition of professional bail bondsmen or a limiting of their authority.¹¹⁰ The relationship between the bail bondsman and the defendant is, at its root, simply contractual in nature, yet the bondsman can remedy the contract's breach with the unusual remedy of self-help.¹¹¹

104. See Minier, *supra* note 1, at B7.

105. Toberg, *supra* note 31, at 143.

106. See Branham, *supra* note 43, at 403 (stating that it costs approximately \$19,118 to confine one prisoner for one year).

107. See *id.*

108. See *supra* notes 42-45 and accompanying text.

109. See FREED & WALD, *supra* note 5.

110. See *id.*

111. Early American courts recognized the relationship as contractual, yet still giving rise to special rights for the bondsman. See *Reese v. United States*, 76 U.S. 13, 22 (1869) (stating that

A. The Special Contractual Relationship Between Bondsman and Defendant

Professional bail bondsmen enter two contracts with defendants. The first is a bilateral contract in which the bondsman agrees to post a bond to meet the defendant's monetary bail obligation, and the defendant agrees to pay a fee and appear in court at the time specified by the judge.¹¹² The defendant also agrees that the bondsman has custodial rights over him with the ability to surrender that defendant at any time or to pursue and apprehend the defendant in the case of nonappearance.¹¹³ The second contract entered by the parties is the bond itself, which is a contract between the defendant, the government and the bail bondsman.¹¹⁴ Though traditional contract law governs analysis of the contract,¹¹⁵ the remedies for breach are unique.

Most contracts are remedied through either expectation or reliance damages.¹¹⁶ The plaintiff sues the defendant for breach of contract in civil court hoping to collect money damages for either expected gains or out-of-pocket expenses spent in reliance on the contract's performance.¹¹⁷ This remedy, however, is ill-suited to the contract between the bondsman and the defendant; while it may work to recover money already lost in forfeiture, it cannot serve to return the defendant to the court before forfeiture occurs.¹¹⁸

when a court accepts the bail from the surety, the government is impliedly agreeing not to interfere with the surety's right to protect his bond); *Fitzpatrick v. Williams*, 46 F.2d 40 (5th Cir. 1931) (holding that a bondsman need not resort to legal process to detain or arrest a defendant, but instead has the power through the contract); *In re Von Der Ahe*, 85 F. 959 (C.C.W.D. Pa. 1898); *Nicolls v. Ingersoll*, 7 Johns. 145, 154 (N.Y. 1810); *Worthen v. Prescott*, 11 A. 690, 693 (Vt. 1887).

112. See *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 551 (9th Cir. 1974). Early and current American courts recognize the contract between bondsman and defendant as giving the bondsman the right to apprehend that defendant.

113. This first contract will hereinafter be referred to as "the contract." It is really a "super contract" because its terms and remedies are unique to the bondsman.

114. A bail bond is "[a] three-party contract which involves [the] state, the accused and the surety and under which [the] surety guarantees that [the] accused will appear at subsequent proceedings." BLACKS LAW DICTIONARY 140 (6th ed. 1990). See also *United States v. Vaccaro*, 719 F. Supp. 1510, 1517 (D. Nev. 1989). This second contract will hereinafter be referred to as "the bond."

115. See *United States v. Figuerola*, 58 F.3d 502, 503 (9th Cir. 1995); *United States v. Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992).

116. See JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 119 (3d ed. 1990) [hereinafter MURRAY ON CONTRACTS].

117. See *id.*

118. It is highly possible that a defendant could be judgment proof or have left the jurisdiction. The nature of the contract is such that if the defendant does not perform and cannot be returned in time to avoid serious forfeiture, he is likely not to be found for a civil case. Additionally, the cost of litigation might far exceed the recovery in cases of minimal bail, discouraging suits.

The plaintiff in a breach of contract action also has recovery options in the form of equitable remedies such as specific performance.¹¹⁹ This remedy is also wholly inadequate because the bondsman has no way to enforce the remedy without the right to apprehend the defendant.

Traditional remedies for breach of contract also do not produce the same social benefits as allowing exercise of custodial powers through self-help. Requiring the bondsman to wait until a breach has occurred and take only civil legal action removes the profit motive to return defendants who flee. The result would be that fewer bail jumpers would be apprehended, and unapprehended jumpers would be free to commit additional crimes.

The possibility of self-help can provide an important deterrent to jumping bail. Defendants with the knowledge that the bail bondsman has the power and ability to apprehend him forcibly will likely think twice before fleeing.

[P]ersonal bondmen in our country are a very aggressive group and relentlessly pursue the defendant who skips bail on which they have surety and bring them back in very many instances. . . . This hard attitude on the part of some of these sureties has put the fear of God into a lot of defendants who know what to expect in the event they skip bail.¹²⁰

Self-help also allows the bail bondsman to mitigate his damages by returning the defendant before the entire bond has been forfeited. As a surety on the bond, the bondsman need not wait until the principal (the defendant) has breached the contract with the obligee (the court) and the obligee has instituted civil action against the surety. Litigation time and expense can be saved. This profit motive ensures immediate and vigorous action.

The old custodial rights of the surety survive in modern society. Perhaps it is as much because of the infeasibility of civil remedies and the social benefit of privatized bail enforcement as the fact that there is historical precedent. There appears to be no judicial movement toward reducing the power of bail bondsmen.¹²¹

The special and controversial powers that bondsmen have begin with the ability to enter into a "super contract" with the defendant and extend to the ability to enforce that contract. The defendant typically agrees that the bondsman

119. See MURRAY ON CONTRACTS, *supra* note 116, at § 117.

120. FREED & WALD, *supra* note 5, at 30-31.

121. See *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 204-05 (5th Cir. 1996) (holding that an arrest warrant does not make the bondsman a state actor); *United States v. Rose*, 731 F.2d 1337, 1345 (8th Cir. 1984) (stating that arrest by a bail bondsman is enforcement of a private contract right, and therefore is outside the jurisdiction of the state.); *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974) (holding that private conduct like that of a bondsman does not give rise to a cause of action under 42 U.S.C. § 1983); *but see Smith v. Rosenbaum*, 333 F. Supp. 35, 38 (E.D. Pa. 1971) (holding that a bondsman was a state actor in this fact situation because he had obtained a "bail piece" from the courts).

can apprehend him using any means reasonably necessary.¹²² Those means often include home invasion,¹²³ crossing state lines,¹²⁴ force,¹²⁵ and deception.¹²⁶ The rights of the bondsman agreed to by the defendant in the contract are unparalleled. Debt collectors, who also stand to lose substantial profits if debtors do not pay, are far more restricted in their tactics than bondsmen.¹²⁷ Despite the contract signed by the debtor, a debt collector who attempts to physically restrain a debtor or enters a debtor's home without permission is subject to criminal liability as well as civil.¹²⁸

The reason for this disparity in contract interpretation can only logically be explained by the different social contributions made by debt collectors and bail bondsmen. Debt collectors protect their own financial interests or the financial interests of the entity who hired them. While it is important to the economy that debts be paid, the social value of debt collection does not extend beyond that benefit. The social value of bail bondsmen, however, extends far beyond the financial interests of the individual bondsman. Profit drives the bondsman to protect his investment,¹²⁹ but the result is far beyond personal gain. The court system is able to operate effectively, the right to bail is protected, and fleeing criminals, of possible danger to society, are apprehended.¹³⁰

122. The defendant is arguably in a significantly weaker contract position, facing jail or the terms of the contract, but the contract has never been found to be unconscionable. *But see* *McCaleb v. Peerless Ins. Co.*, 250 F. Supp. 512, 515 (D. Neb. 1965) (holding that a bondsman had power to apprehend the defendant based on the contract, but could not exceed the power contracted for). In *McCaleb*, the bondsman apprehended the defendant, but did not immediately surrender him to the court, instead driving him around the country and telling him to appear, then to leave town when they returned home. *Id.*

123. *See* *Nicolls v. Ingersoll*, 7 Johns. 145, 156 (N.Y. 1810).

124. *See* *Taylor v. Taintor*, 83 U.S. 366, 371 (1872); *Fitzpatrick v. Williams*, 46 F.2d 40, 41 (5th Cir. 1931); *Nicolls*, 7 Johns. at 154.

125. *See* *State v. Lingerfelt*, 14 S.E. 75, 77 (N.C. 1891) (holding that the force used can even be deadly).

126. Bondsmen have been known to impersonate relatives, long-lost friends, and priests to obtain information and find defendants. *See* Teresa Walker, *Thrill of the Chase Snares Posse of Bounty Hunters*, SAN BERNIDINO COUNTY SUN, Sept. 27, 1992, at B3.

127. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1994), limits the ways in which debt collectors can contact debtors, prohibits harassment and unfair collection practices.

128. *See, e.g.*, *Fassitt v. United T.V. Rental*, 297 So. 2d 283, 287 (La. Ct. App. 1974) (holding that debt collector could not legally break into debtor's home despite contract authorizing it); *Kimble v. Universal T.V. Rental*, 417 N.E.2d 597, 603 (Franklin County Mun. Ct. 1980) (stating that repossessing television by removing window pane and entering house not permissible).

129. Courts have long acknowledged the fact that profit motive leads to effective apprehension. *See, e.g.*, *Pugh v. Rainwater*, 557 F.2d 1189, 1200 (5th Cir. 1977).

130. *See supra* Part II.

B. State Actor Status

The means used by bail bondsmen also exceed, to some extent, the means available to police officers.¹³¹ Since a police officer on duty is working for the government and not for himself, he is clearly a state actor.¹³² State actors are bound by statutory and constitutional limits that do not bind private actors.¹³³ For example, a police officer cannot cross state lines to apprehend a fugitive. He must instead use the formal extradition process in cooperation with another jurisdiction.¹³⁴ Bondsmen are not required to use the extradition process.¹³⁵ They may cross state lines and apprehend the defendant in any jurisdiction. This makes bondsmen both more efficient and more effective at apprehension.

Police officers cannot act to deprive suspects of their constitutionally protected rights. Rights such as those protected by the Fourth Amendment¹³⁶ are

131. While the contractual right of the bail bondsman does allow him to apprehend the defendant, it is limited by the bondsman's duty to the court to surrender the defendant immediately. Any other action does not fall within the contractual right and is not permitted. *See McCaleb v. Peerless Ins. Co.*, 250 F. Supp 512, 515 (D. Neb. 1965).

132. State actors are subject to additional liability and their actions can put the state for which they work at risk of liability. *See* 42 U.S.C. § 1983 (Supp. II 1996). *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), established the two part test for liability under 42 U.S.C. § 1983. First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

133. While the law does not consider bail bondsmen to be state actors, they have been described as enjoying a "hybrid status somewhere between a free enterprise and a public utility." *FREED & WALD, supra* note 5, at 23. *See also* Dill, *supra* note 55, at 644 (describing bail bondsmen as governmental "subcontractors" who operate outside the government but directly affect the goings on in criminal courts).

134. *See California v. Superior Court*, 482 U.S. 400, 407 (1987) (finding that a state must use formal extradition proceedings); Comment, *Bail Bondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964) (discussing the requirement that states use the formal process of extradition). Federal law also requires the use of the extradition process under 18 U.S.C. § 3182 (1994).

135. Bail bondsmen are not required to use extradition. *See Lopez v. McCotter*, 875 F.2d 273, 277 (10th Cir. 1989) (stating that bail bondsmen have the right to cross state line to apprehend defendants, and they are not required to use the extradition process); *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 554-45 (9th Cir. 1974) (stating that a bondsman's authority has nothing to do with extradition).

136. The Fourth Amendment protects citizens from police searches and seizures unless probable cause is previously established sufficient to justify a search warrant. It states:

The right of the people to be secure in their persons, houses, papers, and effects, against

designed to limit the power of the state and its agents to interfere with the property of U.S. citizens.¹³⁷ Evidence gathered in violation of the Fourth Amendment is generally not admissible against the person whose rights were violated in its collection.¹³⁸

Bondsmen, not being state actors, are not bound by the constraints of the Fourth Amendment.¹³⁹ Evidence discovered by a bail bondsman's apprehension of a defendant is admissible even though no search warrant was ever issued.¹⁴⁰ Additionally, bail bondsmen are not required to give *Miranda* warnings in accordance with the Fifth Amendment.¹⁴¹

Different rules and liabilities apply to police officers and bail bondsmen because they serve different functions.¹⁴² It is true that both, as part of their professions, apprehend those who have jumped bail, however, the similarity largely ends there. The rules binding police officers are subject to political will and a desire for a small and unintrusive government.

[T]he changes in police practices which have been mandated by appellate decisions over the last two decades are so sweeping, and the lack of any alternative enforcement mechanism so patent, as to presuppose a substantially new function for local level judicial officials. Many of these decisions, indeed, seem aimed precisely at extending the political doctrine of separation of powers, and the companion doctrine of judicial supremacy, to the administration of local criminal justice. The core assumption in nearly all of them has been that criminal courts must counter-balance the activities of police agencies in order to prevent mistreatment of citizens accused of crime.¹⁴³

Bail bondsmen, however, are not as readily subject to politics. Allowing their

unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

137. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating that searches conducted without warrants are per se unreasonable).

138. See *Murray v. United States*, 487 U.S. 533, 536 (1988).

139. However, if a bail bondsman enlists the help of police officers in apprehending a defendant, the bondsman is then bound by the same constitutional restraints as the police officer. See *Bailey v. Kenney*, 791 F. Supp 1511, 1524 (D. Kan. 1992). Bail bondsmen may also not combat police when apprehending a defendant. See *Lopez*, 875 F.2d at 278.

140. See *Drimmer*, *supra* note 47, at 770.

141. The state is required to warn a suspect of his rights under the Fifth Amendment, and confessions or incriminating statements made without the warnings are inadmissible against the suspect. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

142. Bail bondsmen are not required to give *Miranda* warnings. See *United States v. Rose*, 731 F.2d 1337, 1345 (8th Cir. 1984); *State v. Zeko*, 407 A.2d 1022, 1024 (Conn. 1979); *State v. Perry*, 274 S.E.2d 261, 262 (N.C. Ct. App. 1981).

143. Dill, *supra* note 55, at 671.

power to remain based on contract principles helps to insulate them from the whims of popular political thought. They are able to serve the criminal justice system, yet they operate outside of the sphere of government. Their effectiveness and cost efficiency¹⁴⁴ serve to justify their power partly because the alternatives are undesirable. Without professional bail bondsmen, the alternatives would be to either devote more police manpower and resources to bail enforcement or to let most bail jumpers escape.¹⁴⁵ The damage to the system could be severe, resulting in fewer defendants being released on bail¹⁴⁶ and fewer bail jumpers being brought to justice.

Certainly it is not desirable to allow bail bondsmen to operate completely without restraint. Most states regulate bail bondsmen or require that they be licensed.¹⁴⁷ Evaluation of fitness to act as a surety and any undesirable activity can be evaluated when licenses are renewed. Additionally, the threat of civil liability helps to control activity.¹⁴⁸ There is little to gain by excessive restriction. Moving the rights and liabilities closer to or equal to that of police officers would result in decreased efficiency and increased cost. The broad powers, based on contract rights and historical precedent, enable the delicately balanced system to continue to operate. The disadvantages of declaring that bail bondsmen are state actors far outweigh the advantages. While it might ensure that homes were never entered without warrants and people were never apprehended across state lines without the formal extradition process, the cost would be the entire bail bonds system itself. Restraint of the bondsman's power jeopardizes the bondsman's profit, potentially leading to fewer bondsmen and consequently, fewer opportunities for defendants to make bail.

CONCLUSION

There is no simple answer to the debate that surrounds the professional bail bonds system. With the individual rights of criminal defendants on one side and the needs of a struggling criminal justice system on the other, it is clear that the controversy will not soon be resolved. On both sides is a desire to continue the system of bail in one form or another. Thus far, few acceptable alternatives to professional bail bondsmen can be found.

Some of the concerns about the professional bail bondsman are created by a media-drowned society, which fails to see the important functions that

144. See *supra* Part II.

145. The police have only about a 10% apprehension rate. See Minier, *supra* note 1, at B7.

146. See Comment, *supra* note 134, at 1105.

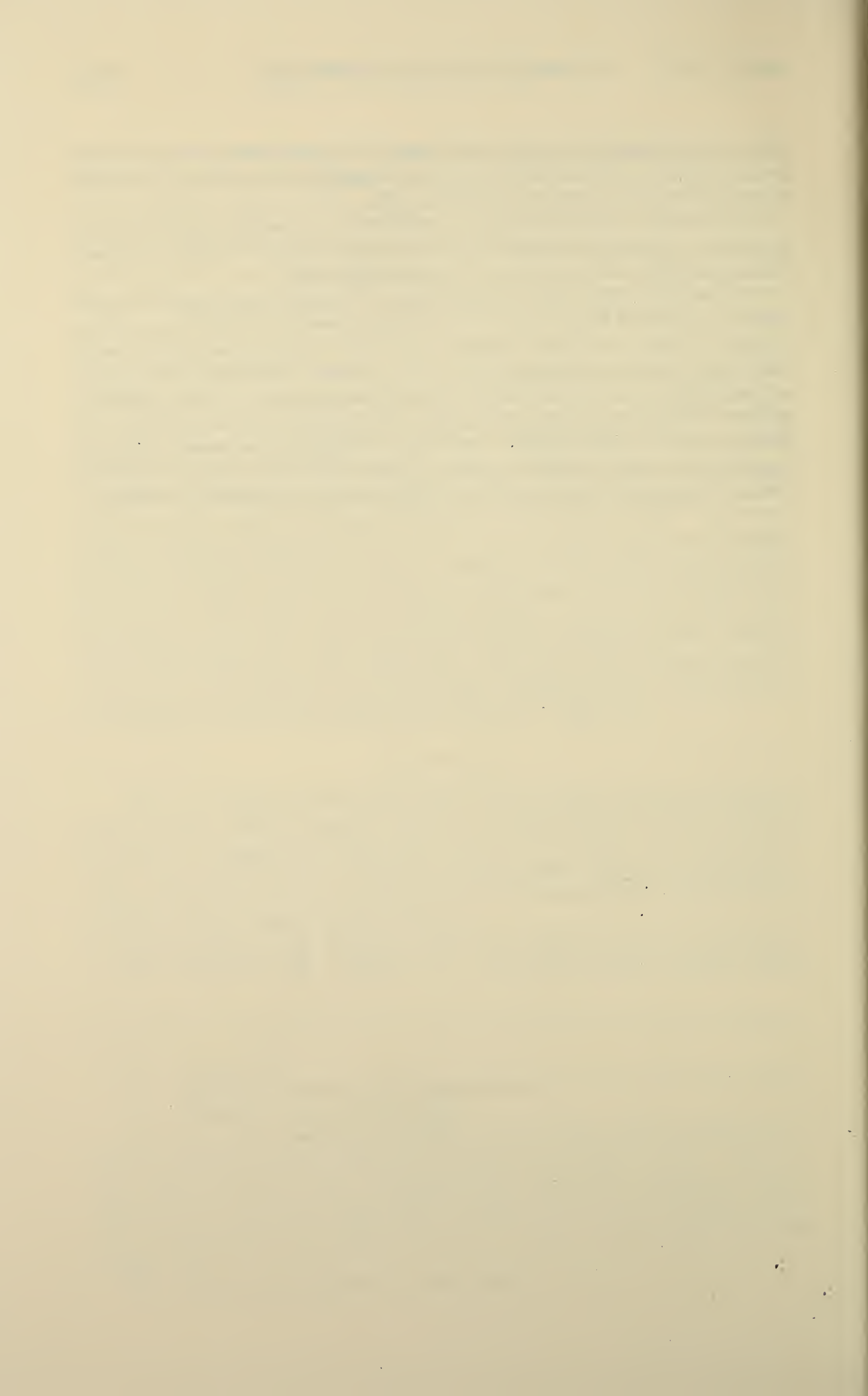
147. See, e.g., ALA. CODE § 15-13-160 (1995); CAL. INS. CODE § 1802 (West 1993); CONN. GEN. STAT. ANN. § 29-145 (West 1990); FLA. STAT. ANN. § 648.34 (West 1996); IND. CODE § 27-10-3 (1998); KY. REV. STAT. ANN. § 304.34-030 (Michie 1988); MISS. CODE ANN. § 83-39-3 (1991); MO. ANN. STAT. § 374.710 (West 1991); NEV. REV. STAT. ANN. § 697.090 (Michie 1993); OKLA. STAT. ANN. tit. 59, § 1303 (West 1989); TEX. REV. CIV. STAT. ANN. art. 2372p-3 (West 1988 & Supp. 1996).

148. See *supra* notes 101-02 and accompanying text.

professional sureties serve in the community. Concerns that the idea of bail is contravened when the defendant's personal wealth is not at stake are answered by the thorough service bail bondsmen provide.

The ability to be free on bail is considered an important right worthy of protection. Freedom before trial helps a defendant prepare a defense, and bail bondsmen help more people take advantage of that right.

The old idea of bail has survived centuries, though it has changed in ways that the medieval English sheriffs who conceived of it could never have imagined. Despite the nearly constant rights of the surety, the face of the surety has changed as the nature of society has changed. No longer are people nontransitory and acquainted with everyone in the community. Now sureties are professionals, driven not only by the fear of losing personal wealth, but by the desire to turn a profit for their services. Striving for personal profit, the professional bail bondsman brings important benefits to the society in which he works. Changing the effective system of the status quo would be a mistake.



A NEW UNDERSTANDING OF SPECIFIC ACT EVIDENCE IN HOMICIDE CASES WHERE THE ACCUSED CLAIMS SELF-DEFENSE: STRIKING THE PROPER BALANCE BETWEEN COMPETING POLICY GOALS

MARY KAY KLEISS*

INTRODUCTION

Your client has been charged with murder and the state is seeking to execute her. Your client admits she killed the decedent, but claims she acted in self-defense because he was the initial aggressor. Because there are no eye-witnesses to the tragic occurrence, the issue of initial aggressor is in dispute. On the night of the incident, your client was by herself in her brother's house when a man, brandishing a gun, kicked in the door and entered the home. She did not recognize the man. Because the location is a high-crime area, her brother kept a gun under the sofa. Terrified, she reached for the gun, but the man pointed his gun at her and ordered her to sit down. She lunged for the gun and shot the intruder. Later, she learned he was a police officer looking for your client's brother because of a barking dog report.

At trial, you attempt to call witnesses to testify that the decedent had a violent and aggressive character based on specific acts they had witnessed. You also attempt to introduce his recent battery conviction. The witnesses would testify that the decedent randomly stopped cars to harass drivers; he carried a knife to threaten people; he routinely became violent when they tried to report him; and that on several occasions they saw him brutally assault people he was arresting. Two former girlfriends also would testify that he periodically beat them when he was drunk. This testimony is supported by his previous conviction and disciplinary records. You argue that the testimony and prior conviction should be admitted as character evidence. These specific violent acts are probative evidence that would allow the jury to infer that he likely was acting in accordance with his violent and aggressive character. Introduction of this evidence, you argue, supports the proposition that the decedent was in fact the initial aggressor. Nevertheless, the judge refuses to admit these specific violent acts to prove the decedent was the initial aggressor based on Federal Rules of Evidence ("FRE") 404(a)(2) and 405(a).¹ Without this relevant, specific act

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1. The general rule and its exceptions are stated in FRE 404, which provides:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide

evidence, it appears the state will execute your client.

While the fact pattern above is hypothetical, the basic predicament frequently arises for defense attorneys in many jurisdictions. The criminally accused, in self-defense cases where the decedent is the initial aggressor, are often denied their right to present a full and adequate defense by introducing specific act evidence that would help discover the truth. This Note shows that allowing specific act evidence is the most rational and equitable solution to the dilemma faced by a homicide defendant claiming self-defense under an initial aggressor theory. In establishing this proposition, the Note analyzes the current law in various jurisdictions. Parts I and II include an examination of character evidence and the form this proof may take. The Federal Rules approach is contrasted with other approaches allowing specific act evidence when the accused claims the decedent was the initial aggressor. To highlight the controversy, Part III addresses the policy debate. This Note demonstrates that many of the various policies advanced for disallowing specific act evidence are unfounded. Because this Note focuses on greater admissibility of specific act evidence when an accused claims the decedent was the initial aggressor, Part IV surveys and analyzes legislation and case law supporting the admissibility of specific act evidence. Various compromise solutions taken by a growing number of jurisdictions are discussed in detail. Part V argues that the Federal Rules have not struck the proper balance between competing policy considerations. The discussion focuses on a renewed awareness of an accused's liberty interests, her ability to present a defense, the truth-finding function of our adversarial system and the prejudice that results from the accused being unable to introduce such evidence. Finally, this Note proposes two solutions that include a broader use of specific act evidence to establish the decedent as the initial aggressor and concludes that FRE 405 should be amended to allow specific act evidence.

I. BACKGROUND

A. Character Evidence: Distinguishing the Purposes of Its Use in Self-Defense Cases

Character is defined as "the nature of a person, his disposition generally, or his disposition in respect to a particular trait such as peacefulness or truthfulness."² It is important to distinguish the purposes for which evidence of the decedent's violent character may be admitted to support the accused's claim of self-defense. When an accused claims self-defense in a homicide case and attempts to offer character evidence of the decedent's violence, aggression, or

case to rebut evidence that the victim was the first aggressor[.]

FED. R. EVID. 404. FRE 405(a) states: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." FED. R. EVID. 405.

2. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.1 (4th ed. 1996).

turbulence, she may attempt to offer the evidence under two distinct theories.

First, the accused may claim she was reasonably afraid of the decedent, and based on this reasonable belief, she was justified in using force in response to the attack by the decedent.³ Under a "reasonable belief" theory, the violent character evidence is offered to show the reasonableness of the accused's subjective belief that she was in danger of serious bodily injury or death, and not to show that the decedent acted in conformity with his character.⁴ The accused offers the character evidence to prove that the degree of force she used was reasonable under the circumstances based on her knowledge of the decedent's violent tendencies.⁵ If the decedent's violent character was known to the accused, this is clearly a factor to be considered in determining whether she was put in fear of serious bodily harm or death.⁶ Thus, when the claim involves the reasonableness of the accused's actions, and the accused has prior knowledge of the decedent's violent character, specific bad act evidence is admissible to prove that the decedent had a violent character and that the accused had reason to fear the decedent.⁷

The second self-defense theory under which an accused may offer character evidence of the decedent's violent or aggressive disposition is an "initial aggressor" theory. Under this theory, the accused uses character evidence to prove circumstantially that the decedent was the initial or first aggressor.⁸ The purpose of this theory is to help the fact-finder determine who the initial aggressor was in cases where a dispute arises as to whether the decedent, or the accused, initiated the attack.⁹ The accused introduces evidence of the decedent's violent character to establish that it was more probable that the decedent was the initial aggressor based on the inference that, at the time of the act, the decedent's conduct was in conformity with his character for violence.¹⁰ The inference that the decedent's conduct conformed to his character for violence is an objective, factual determination based on the totality of the circumstances, which includes character evidence.¹¹ Knowledge of the decedent's violent character is

3. See James A. Adams, *Admissibility of Proof of an Assault Victim's Specific Instances of Conduct as an Essential Element of a Self-Defense Claim Under Iowa Rule of Evidence 405*, 39 DRAKE L. REV. 401, 406 (1990).

4. See *id.*

5. See Erica Hinkle MacDonald, *Victim or Villain?: A Case for Narrowing the Scope of Admissibility of a Victim's Prior Bad Acts in Illinois*, 46 DEPAUL L. REV. 183, 186 (1996).

6. See GRAHAM, *supra* note 2, § 404.4.

7. See Adams, *supra* note 3, at 418-19.

8. See MacDonald, *supra* note 5, at 186.

9. See *id.*

10. See GRAHAM LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.4 (2d ed. 1987).

11. See Adams, *supra* note 3, at 405. See also *State v. Miranda*, 405 A.2d 622 (Conn. 1978), where the court stated:

The case for admissibility of character evidence on the vital issue of who was the aggressor has been cogently stated by Professor Wigmore. When evidence of the deceased's violent character is offered to show the defendant's state of mind, "it is

irrelevant.

In contrast to the "reasonable belief" theory, the accused claiming self-defense under an "initial aggressor" theory must overcome several obstacles before character evidence is admissible. The main issues raised by an attempt to offer the decedent's character to circumstantially prove that he was the initial aggressor include: (1) whether the evidence is relevant¹² and not unduly prejudicial;¹³ and (2) what form the character evidence may take—reputation, opinion, or specific instances of conduct.¹⁴

*B. Specific Act Evidence and the "Initial Aggressor" Theory
Under the Federal Rules*

Under the Federal Rules of Evidence, the accused is not allowed to prove the decedent was the initial aggressor by introducing character evidence in the form of specific act evidence to show that the decedent acted in conformity with his violent character trait during the incident.¹⁵ The following is, therefore, an

obvious that the deceased's character, as affecting the defendant's apprehensions, must have become known to him; i.e. proof of the character must indispensably be accompanied by proof of its Communication to the defendant; else it is irrelevant." But when evidence of the deceased's character is offered to show that he was the aggressor, "this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief."

Id. at 623 (citing 1 WIGMORE, EVIDENCE § 63 (3d ed.)).

12. FRE 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

FRE 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

13. FRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

14. The Advisory Committee's Note to FRE 404 provides:

Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

FED. R. EVID. 404 Advisory Committee's Note.

15. See GRAHAM, *supra* note 2, § 404.4; see also discussion *infra* Part II.

improper chain of inferences: introducing specific act evidence of the decedent's violent character to prove the decedent's violent and aggressive disposition (i.e., propensity for violence) to ultimately prove that the decedent acted in conformity with his character and was the initial aggressor.¹⁶ The proposition of fact the accused is trying to prove is forbidden under the Federal Rules because the specific inferential chain includes the decedent's propensity for violence or aggression to prove first aggressor.¹⁷ The accused is restricted to introducing character evidence in the form of reputation or opinion evidence to prove circumstantially that the decedent was the initial aggressor.¹⁸

However, it is incorrect to say that the accused cannot introduce specific act evidence of initial aggressor under the Federal Rules. The accused may in some cases introduce specific act evidence to prove first aggressor as long as it is not being used to prove the decedent's character. For instance, uncommunicated threats made by the decedent against the accused to a third party may be shown by specific act evidence.¹⁹ A defense witness can testify that the decedent told the witness that he intended to kill the defendant. The accused may introduce these threats to prove first aggressor because the decedent's intent to harm the accused is evidence that he carried through with the plan. This is relevant evidence to show initial aggressor, and is not being used to prove the character of the decedent. A communicated threat by the decedent against the accused may also be used to prove initial aggressor.²⁰ Here, the decedent actually communicated specific threats to the accused that are relevant to show the decedent was the initial aggressor. Finally, the conduct of the decedent as part of the sequence of events surrounding the murder may be proved by specific act evidence.²¹ In determining who attacked first, the issue is what the deceased probably did.²² An accused can testify, "He (the decedent) pointed a gun at me."

Yet, in many cases, the foregoing types of evidence are simply unavailable because the accused and the decedent were not acquainted and thus prior direct or indirect threats by the decedent are nonexistent. Moreover, even though the accused may testify as to the surrounding circumstances, her credibility is at issue and the jury may ultimately disbelieve her without the benefit of admitting other specific, prior violent acts by the decedent.²³

16. See LILLY, *supra* note 10, § 5.4, at 127.

17. See *id.*

18. See MacDonald, *supra* note 5, at 193-94; see also discussion *infra* Part II.B.

19. See 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 139, at 167 (1977); 1A JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 110 (Little Brown rev. ed. 1983).

20. See *id.*

21. See 6 JOHN HENRY WIGMORE, EVIDENCE § 1745 (James H. Chadbourn rev. ed. 1976).

22. See *id.*

23. Justice Gregory stated in dissent in *Lolley v. State*, 385 S.E.2d 285 (Ga. 1989): At first blush, one might suppose that a defendant in these circumstances has an advantage because the only other eyewitness cannot testify, permitting the defendant to mold the "facts" at will. But experience suggests that fact-finders may tend to

C. Framing the Debate: Alternatives to the Federal Rules Approach

In contrast to the Federal Rules approach, some states permit the accused to prove the decedent was the initial aggressor by offering specific instances of conduct by the decedent.²⁴ In these jurisdictions, character evidence in the form of specific bad acts is used to prove that the decedent was the initial aggressor through the inference that his conduct conformed to his violent character, thus making more probable the accused's claim that he was the first aggressor.²⁵ A few jurisdictions totally reject the Federal Rules approach, while other jurisdictions have developed compromise solutions.²⁶ The jurisdictions adopting a compromise solution include those that allow prior bad act evidence by the

compensate (perhaps over-compensate) for this perceived advantage, by a skeptical approach to the defendant's veracity. Let us suppose the case of an innocent defendant who honestly acted in self-defense, and killed to avoid being killed or seriously injured. His proof comes only from his own words, suspect though they are.

Id. at 289.

24. See *infra* note 49 and accompanying text.

25. See discussion *infra* Part IV. The following example was given by Justices Weltner, Bell and Hunt, concurring in *Lolley v. State*, 385 S.E.2d 285 (Ga. 1989):

The town ruffian, in a drunken and enraged state, advances upon . . . a stranger, and is killed by him. There are no eyewitnesses to the homicide. The defendant relates that the decedent advanced upon him in a drunken and enraged state, threatening him with mayhem. The decedent had no weapon. At trial, the defendant, who had no knowledge of the decedent before the killing, offers evidence of his violent nature, through specific acts of violence against third persons. Here the principal question is the credibility of the defendant. Did it happen the way he related it? And why would the decedent make an unprovoked advance upon the defendant? In aid of this inquiry, evidence of the violent acts of the decedent would be of great relevance.

* * *

[I]n the past we have restricted evidence of specific acts of violence to those committed by the victim against the defendant. Yet, logic dictates no such distinction. Rather, the chain of reason proceeds as follows: A claims justification in that B committed acts of violence against A. A proves that B has committed prior acts of violence. B's prior violent acts are relevant to the question of whether A's account of violent acts by B against A is true. It is the act of violence that is relevant, and not the identity of the victim. That relevance is found in this summary of human experience: "It is more probable that a person will act in accordance with his character disposition than that he will act contrary to it." Thus, a decedent's violent acts against a third party can be as relevant as his violent acts against a defendant in weighing the truth of a defendant's claim of justification.

Id. at 288 (internal citations omitted). This reasoning was adopted by the majority in *Chandler v. State*, 405 S.E.2d 669 (Ga. 1991). See *infra* note 160 and accompanying text.

26. See discussion *infra* Parts IV.A., B., C.

decedent only in homicide cases,²⁷ and other jurisdictions that allow the decedent's prior conviction(s) for violent crimes to be admitted under an initial aggressor theory.²⁸ Finally, some states have fashioned a solution by reasoning that a decedent's aggressive or violent character is an "essential element" of the accused's self-defense claim, and thus allow the accused to introduce specific act evidence to prove the decedent's character.²⁹

Because strong policy arguments support both approaches to the admissibility and inadmissibility of specific act evidence, jurisdictions are divided on this issue.³⁰ By 1994, twenty-one jurisdictions had adopted an approach that allowed specific act evidence of the victims's violent character to be admitted when the accused claimed she acted in self-defense because the decedent was the initial aggressor.³¹ On the other hand, thirty jurisdictions followed the Federal Rules approach that specific act evidence of the decedent's violent nature is only admissible to show a defendant's state of mind under a "reasonable belief" theory, and not to show the decedent was the initial aggressor.³²

II. THE FEDERAL RULES FRAMEWORK

A. Meeting the Requirement of FRE 404

Under FRE 404(a), proof of a person's character, either the defendant's or the victim's, is inadmissible to prove that the person acted in a manner consistent with that character.³³ This is referred to as the "propensity rule," or the basic rule that character evidence cannot be introduced circumstantially to prove conduct.³⁴ The basic policy behind the rule is that "[e]vidence of the general character of a party or witness almost always has some probative value, but in many situations, the probative value is slight and the potential for prejudice is large."³⁵

27. See discussion *infra* Part IV.C.2.

28. See discussion *infra* Part IV.C.1.

29. See discussion *infra* Part IV.B.

30. See Mark R. Horton, *Whether a Defendant's Claim of Victim Aggressiveness is an "Essential Element" of the Defense of Self-Defense*: State v. Baca I & II, 24 N.M. L. REV. 449, 454-55 (1994).

31. See *id.*

32. See *id.*

33. See *supra* note 1.

34. See LOUISELL & MUELLER, *supra* note 19, § 136, at 124-25.

35. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 186 (Edward W. Cleary ed., 3d ed. 1984). Professor McCormick elaborates further that:

[E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how the individual acted . . . in the matter in question. By and large, persons reputed to be violent commit more assaults than persons known to be peaceable. Yet, evidence of character . . . generally will not be received to prove that a person engaged in certain conduct or did so with a

It is important to keep in mind that the Federal Rules are designed to protect the accused from prejudice resulting from the prosecution introducing specific prior bad acts of the accused, and not to stymie the accused from presenting relevant evidence that may raise a reasonable doubt as to her guilt.³⁶

When a defendant charged with murder or manslaughter admits killing the person, but claims she acted in self-defense, evidence of the violent or dangerous character or reputation of the decedent is relevant.³⁷ Thus, under FRE 404(a)(2), an exception to the propensity rule is made when the accused in a homicide case claims self-defense and attempts to offer character evidence of the decedent.³⁸ FRE 404(a)(2) permits the accused to introduce "[e]vidence of a pertinent trait of character of the victim of the crime"³⁹ This exception provides one of the few situations where character evidence is admissible to allow the jury to infer that a person indeed acted in conformity with his character on a specific occasion.⁴⁰ A risk of prejudice still exists, yet the probative value of the evidence usually outweighs this prejudice.⁴¹ Whether the decedent is a violent and

particular intent on a specific occasion, so-called circumstantial use of character. . . . Character evidence used for this purpose, while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise.

Id. § 188.

36. See Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 659-60 (1993). See also FRE 102, which states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

37. The Advisory Committee's Note to FRE 404 states: "The criminal rule [with respect to character evidence] is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." FED. R. EVID. 404, Advisory Committee's Note.

38. See LOUISELL & MUELLER, *supra* note 19, § 139. These authors note that: [The] reasons for exception created by [FRE] 404(a)(2) are that the evidence of character is considered relevant as proof of conduct, and that the risks of unfair prejudice which call for excluding evidence of the defendant's character are absent in connection with the victim's character. There is of course, a new risk—namely, that the jury will acquit if it believes the victim is a bad person who "had it coming;" such an acquittal would amount to a "decision on an improper basis," and this idea lies at the heart of the "unfair prejudice" doctrine embodied in [FRE] 403. In criminal cases, however, the risk of unfair prejudice seems low enough to be entirely acceptable, and [FRE] 404(a)(2) expresses that judgment clearly.

Id.

39. See *supra* note 1.

40. See, e.g., *United States v. Keiser*, 57 F.3d 847, 854 (9th Cir. 1995).

41. See MCCORMICK, *supra* note 35, § 193. Professor McCormick further states that: The fact that the character of the victim is being proved renders inapposite the usual

aggressive individual is relevant to the claim by the accused that she was acting in defense of her own life. The decedent's violent character, as opposed to his peaceful character, makes it more probable that his actions at the time of the incident were also violent. This in turn supports the accused's claim that she acted in self-defense.

B. Meeting the Requirement of FRE 405 Under an Initial Aggressor Theory

Given that the character of the decedent will generally be relevant in a homicide case, the vital question of what form this evidence may take must next be considered by the defense attorney. This is the crux of the problem for the defense. Under FRE 405, three methods of proof are recognized: (1) reputation evidence, (2) opinion evidence, and (3) specific instance or specific act evidence.⁴² The Advisory Committee's Note to FRE 405 provides the following guideline:

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.⁴³

Therefore, under the Federal Rules framework, despite the relevance of the proffered specific act evidence, an accused may only prove a decedent's violent and aggressive character by introducing reputation or opinion evidence to prove

concern over the untoward impact of evidence of the defendant's poor character on the jury's assessment of the case against him. There is, however, a risk of a different form of prejudice. Learning of the victim's bad character could lead the jury to think that the victim merely "got what he deserved" and to acquit for that reason. Nevertheless, at least in murder and perhaps in battery cases as well, when the identity of the first aggressor is really in doubt, the probative value of the evidence ordinarily justifies taking this risk.

Id.

42. FRE 405 provides:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

FED. R. EVID. 405.

43. FED. R. EVID. 405, Advisory Committee's Note.

he was the initial aggressor.⁴⁴ To lay a proper foundation for reputation evidence, the accused must establish that the witness is familiar with the decedent's reputation for violence in the relevant community or has heard of his reputation.⁴⁵ In many jurisdictions, the accused may also prove the decedent's violent character by introducing witnesses who testify as to their opinion of the decedent's violent tendencies.⁴⁶ Under this method of proof, the accused must show that the witness knew the decedent well enough or was acquainted with him in order to form an opinion as to his character.⁴⁷

Professor McCormick noted: "As one moves from the specific to the general in this fashion, the pungency and persuasiveness of the evidence declines, but so does its tendency to arouse undue prejudice, to confuse and distract, and to raise time-consuming side issues."⁴⁸ It is mainly for this reason that the Federal Rules limit the accused to proving character by reputation or opinion evidence when the accused claims the decedent was the initial aggressor. However, a growing minority of jurisdictions, including some that have adopted the Federal Rules, utilize some type of compromise solution that allow an accused to admit specific act evidence of the decedent's violent character to prove initial aggressor.⁴⁹

III. STRIKING THE PROPER BALANCE BETWEEN COMPETING POLICIES

In determining whether the Federal Rules framework or a compromise solution is the most preferable, the courts have listed a host of policy arguments and rationales. The evidentiary rules that have developed for character evidence represent an effort to strike the proper balance between the probative value of the evidence and the competing policy considerations.⁵⁰ The determination ultimately depends on how much emphasis is placed on either interpreting FRE 405 consistent with the drafters' intent or on considering the competing policy goals.⁵¹ "[C]ourts must weigh the constitutional imperative to preserve [an accused's] right to present a defense against the need to enforce" the law.⁵²

44. See MacDonald, *supra* note 5, at 188.

45. See MCCORMICK, *supra* note 35, § 191.

46. See *id.*

47. See *id.*

48. *Id.* § 186.

49. See Horton, *supra* note 30, at 454-55. Horton's 1994 compilation provided the following breakdown: Federal Rule Jurisdictions: Alaska, Connecticut, Hawaii, Iowa, Mississippi, Nebraska, New Hampshire, North Dakota, Oklahoma, Texas, Utah, and Wyoming. Non-Federal Rule Jurisdictions: Alabama, California, Washington, D.C., Georgia, Illinois, Kansas, Maryland, Pennsylvania, and Virginia. *Id.* at 461 n.34.

50. See LILLY, *supra* note 10, § 5.2 (citing MCCORMICK, § 186).

51. See Horton, *supra* note 30, at 457-58.

52. *Id.*

A. Policies Furthering the Inadmissibility of Specific Act Evidence to Prove the Decedents's Character for Violence

The following policy arguments have been advanced to support the position that an accused should be limited to proving the decedent's character by reputation or opinion evidence under an initial aggressor theory.⁵³

The first policy advanced by proponents of the Federal Rules framework is that a single act may have been exceptional and unusual.⁵⁴ Because the decedent's act on the particular occasion may have been wholly uncharacteristic, there is minimal probative value in the admission of specific act evidence.⁵⁵ Thus, it is argued that specific act evidence should be prohibited where its only relevance to the case is showing the decedent's propensity for violence.

The second policy argument for disallowing specific act evidence is that "permitting proof of specific acts would multiply the issues, prolong the trial and confuse the jury."⁵⁶ Since numerous collateral issues⁵⁷ may be raised, there is a systematic concern of wasting time and money by creating a trial within a trial.⁵⁸

Third, there is a concern that the collateral issues may cloud the real issues and confuse the jury.⁵⁹ Based on the prejudicial nature of specific act evidence, the jurors may acquit the defendant because "the victim was a violent person and deserved to die"⁶⁰ or because the jurors felt the victim "got what he deserved."⁶¹ Character evidence, it is claimed, has the potential of distracting the jury from the main issues in the case.⁶²

Another policy argument advanced is that "although the state is bound to foresee that the general character of the deceased may be put in issue, it cannot anticipate and prepare to rebut each and every specific act of violence."⁶³ It is argued that the state is put at an unfair disadvantage when the accused is allowed to admit such evidence.

The final policy advanced is that because the prosecution cannot introduce evidence of the accused's past acts of violence, the accused also should not be allowed to benefit from evidence of specific acts of the decedent.⁶⁴ According to proponents of this approach, allowing the accused to admit this evidence

53. See MacDonald, *supra* note 5, at 194-97; see also Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975); State v. Waller, 816 S.W.2d 212, 214-15 (Mo. 1991).

54. See Henderson, 218 S.E.2d at 615.

55. See MacDonald, *supra* note 5, at 194.

56. Henderson, 218 S.E.2d at 615.

57. See Waller, 816 S.W.2d at 214.

58. See LILLY, *supra* note 10, § 5.2; see also MacDonald, *supra* note 5, at 196.

59. See Waller, 816 S.W.2d at 214.

60. MacDonald, *supra* note 5, at 195 (citing Chandler v. State, 405 S.E.2d 669, 675 (Ga. 1991) (Benham, J., concurring)).

61. *Id.*

62. See LILLY, *supra* note 10, § 5.2.

63. Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975).

64. See Waller, 816 S.W.2d at 215.

"creates a double standard favorable to the defendant."⁶⁵

B. Competing Policies Allowing the Introduction of Specific Act Evidence to Prove the Decedent's Character for Violence

Like the policies supporting the inadmissibility of specific act evidence to prove the decedent's violent character, the policies favoring the admissibility of such evidence similarly focus on the probative value of the specific act evidence, the prejudicial nature of this method of proof, and the systematic affects of this type of proof.⁶⁶ However, the policy arguments allowing specific bad act evidence to be introduced also focus on protecting the accused from unfair prejudice and protecting the accused's fundamental right to present an adequate defense while safeguarding the truth-finding function of the criminal justice system.

The Federal Rules were designed to protect the accused from prejudice resulting from the prosecution introducing specific, prior bad acts of the defendant, and not to stymie the accused from presenting relevant evidence that may help the jury determine the truth.⁶⁷ Evidence of the decedent's violent character is probative of the specific actions he took on the occasion in question.⁶⁸ Thus, it is nearly always relevant.⁶⁹ In the words of FRE 401, the admission of specific bad act evidence has a "tendency to make the existence of [a] fact . . . of consequence to the determination of the action more probable . . . than it would be without the evidence."⁷⁰ Finally, lest it not be forgotten, three basic policies underlie our adversarial system: (1) the need to provide justice in individual cases, (2) the need to ensure equal justice among like cases, and (3) the need to perform both of these functions without so overloading the system that no justice is rendered at all.⁷¹

1. Highly Probative Nature of Specific Act Evidence.—The Federal Rules of Evidence Advisory Committee's Notes state that: "Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing . . ."⁷² Specific act evidence has been deemed highly probative by a number of jurisdictions because a person's behavior on past occasions is very often the best indicator of the person's future behavior.⁷³

65. *Id.*

66. See MacDonald, *supra* note 5, at 197.

67. See Larsen, *supra* note 36, at 659-60.

68. See LILLY, *supra* note 10, § 5.2.

69. See *id.*

70. FED. R. EVID. 401.

71. See Larsen, *supra* note 36, at 680 (citing STEPHAN LANDMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 12-13 (1988)).

72. See *supra* note 43.

73. See Larsen, *supra* note 36, at 655 (citing MCCORMICK, *supra* note 35, at 550, stating that McCormick notes: "[O]f the three types of character evidence, proof of specific past acts is the most reliable predictor of future behavior.").

Human experience suggests that it is more likely that a person will act in accordance with his character or disposition than he will act contrary to it.⁷⁴ “Thus, a decedent’s violent acts against a third party can be as relevant as his violent acts against a defendant in weighing the truth of a defendant’s claim of justification.”⁷⁵ Professor Wigmore stated that when self-defense is claimed in a homicide trial, and a controversy arises as to whether the decedent was the aggressor, “one’s persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased’s action.”⁷⁶ Moreover, “[i]t is foolish to exclude helpful evidence simply because it tends to prove the fact by proving predisposition to perform it. Relevant is relevant.”⁷⁷ People make judgments every day based on “predictive assumptions” about other peoples’ behavior.⁷⁸ We are all evaluated based on our past performance and behavior.⁷⁹

2. *Serving the Truth-Finding Function.*—Specific act evidence of the violent character of the decedent is often critically important to the discovery of the truth. In a homicide case, there is a fundamental need to uphold this truth-finding function. Courts should not “disregard the fundamental and pragmatic policy which recognizes that, in striking a balance between competing evidentiary rules, one must never lose sight of the fact that effective fact finding requires ‘utilizing all rational means for the ascertainment of truth.’”⁸⁰ Failure to give ample credence to this principle deprives the accused “of proof which [goes] to the heart of his guilt or innocence.”⁸¹ In the case of murder, where the only eyewitnesses are the parties to the occurrence, the credibility of the accused who claims the decedent was the initial aggressor is called into question.⁸² The ability

74. See *Lolley v. State*, 385 S.E.2d 285, 288 (Ga. 1989).

75. *Id.*

76. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 63 (Tillers ed. 1983).

77. H. Richard Urviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982). Professor Urviller states:

[T]he truth-seeker may consider certain facts for their value as predictors of behavior of events. The probity of this . . . category of evidence is based upon the common concurrence or predictable recurrence of certain events or behavioral patterns. . . . Thus, the governing assumption is something like this: habits persist, events recur in familiar form, and the peculiarity of individuality continues to identify the actor in successive transactions.

Id. at 890.

78. See *id.*

79. Professor Urviller states further: “The comment, ‘I’m sure he did it; it’s just the sort of thing he would do,’ is so common it passes without notice as a system of proof. . . . [W]e all believe that people act predictably according to their character.” *Id.*

80. *In re Robert S.*, 420 N.E.2d 390, 392 (N.Y. 1981) (Fuchsberg, J., dissenting) (quoting 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM (John Bowring ed., 1843)).

81. *Id.*

82. See, e.g., *Lolley v. State*, 385 S.E.2d 285, 289 (Ga. 1989) (Gregory, J., dissenting) (stating that in most cases of murder there are no eye-witnesses and the veracity of the accused

of the accused to exonerate herself depends on the jury believing her story.⁸³

3. *Presenting an Adequate Defense.*—The accused also should be allowed to introduce specific act evidence because there is a constitutional imperative to preserve an accused's right to present a defense.⁸⁴ A court should admit specific act evidence of the decedent's aggressive character when an accused claims self-defense in all cases, including assault and battery. However, homicide cases present an exceptional circumstance because the accused's liberty, and perhaps life, is at stake to an even greater degree. When the accused claims the decedent was the initial aggressor, there should be great leeway in admitting potentially exculpatory evidence that would tend to show the decedent was in fact the initial aggressor.⁸⁵ Proof that the decedent had a violent character supports the accused's claim that killing the decedent was necessary to prevent serious bodily injury to herself or to save her own life. A homicide defendant should have the ability to present the best evidence available to her when the stakes are the highest.⁸⁶ In many cases, the only way an accused can exonerate herself is to prove circumstantially that the decedent attacked first. Often, other evidence to support this defense is unavailable because there are no eye-witnesses and the accused and the decedent did not know one another. In such situations, without the benefit of specific character evidence, the accused can only tell her side of the story and hope that the jury believes her. Specific act evidence should be allowed to corroborate the accused's recollection of the events and enable her to present a full defense.

4. *Rebuttal to Proponents of Federal Rules Approach.*—The systemic concerns offered by proponents of the Federal Rules approach are unfounded. There is no basis or empirical evidence to support the argument that a jury may acquit a guilty person because it perceives the decedent, against whom the specific act evidence is introduced, as a bad person deserving of punishment.⁸⁷ The rule disallowing specific bad acts of the decedent "bases its exclusions on a fear that evidence of propensity will be misapplied by a jury to license criminal conduct against an unworthy victim."⁸⁸ This reasoning "proceeds from the mistaken and, indeed, entirely unempirical assumption that modern juries . . . are 'bereft of educated and intelligent persons who can be expected to apply their ordinary judgment and practical experience.'"⁸⁹

When specific act evidence is relevant to the case and a proper foundation

becomes "critical to the fact-finding process").

83. *See id.*

84. *See Horton, supra* note 30, at 457.

85. *See In re Robert S.*, 420 N.E.2d at 394. Admission of specific act evidence also accords "the deference due our basic philosophic belief that . . . in criminal cases there is to be greater latitude in admitting exculpatory evidence than in determining whether prejudicial potentialities in proof offered to show guilt should result in its exclusion." *Id.*

86. *See Horton, supra* note 30, at 458-59.

87. *See Larsen, supra* note 36, at 660.

88. *In re Robert S.*, 420 N.E.2d at 394.

89. *Id.* (quoting *Havas v. Victory Paper Stock Co.*, 402 N.E.2d 1136 (N.Y. 1980)).

has been laid, the possibility of the jury misunderstanding the purpose of the specific act evidence “is so outweighed by truth-finding considerations that concern for it is obviated.”⁹⁰ There is no basis for concluding that the jury may acquit a guilty person because it believes the decedent deserved punishment.⁹¹ The accused, not the decedent, is on trial and the jury is not in the position to punish the decedent.⁹² However, the jury is in the position to consider evidence that may raise a reasonable doubt as to the accused’s guilt.⁹³

The court in *State v. Miranda*⁹⁴ rejected the rationale that admitting specific act evidence on the issue of initial aggressor would unfairly prejudice the prosecution by tempting the jury “to measure the guilt of the accused by the deserts of the victim.”⁹⁵ The court explained that when the deceased’s violent character is introduced, the state has the right of rebuttal.⁹⁶ Although a risk exists that the jury will be unduly diverted and confused by collateral matters, the court has the ability to focus the jury’s attention on the material issues in the trial.⁹⁷ Additionally, “unfair surprise” to the prosecution is not a ground for exclusion of relevant evidence in the majority of the states.⁹⁸ The fact that the decedent had a criminal history or a violent character should not come as a surprise to the prosecution.⁹⁹ This is especially true if the prosecution has diligently investigated its case. As will be discussed below, any possible prejudice to the prosecution can be overcome by requiring the defense to give notice of its intent to rely on particular prior bad acts or convictions.¹⁰⁰

Finally, the argument that the “playing field” must be leveled is similarly

90. *Id.*

91. *See* Larsen, *supra* note 36, at 659-60.

92. *See id.*

93. *See id.*

94. 405 A.2d 622 (Conn. 1978).

95. *Id.* at 624. The *Miranda* court went on to rebut the policies and rationales relied on by jurisdictions excluding specific act evidence. The court adopted the reasoning of the decisions in those jurisdictions allowing specific act evidence. The court stated:

[T]he nature of such evidence and the victim’s absence from the trial warrant a narrow exception to the rule that conduct may not be used to prove character. That a homicide victim has a record of violent crime should not come as a surprise to the prosecution. Nor is introduction of the victim’s criminal record likely to confuse the jury and waste time, since the fact of the convictions is beyond dispute and inquiry must necessarily be limited to the time the events occurred and the nature of the conduct for which the victim was convicted. Most important, such evidence can be highly relevant in helping the jury to determine whether the victim had a violent disposition and whether the defendant’s story of self-defense is truthful.

Id. at 625 (citations omitted).

96. *Id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *See* discussion *infra* Part IV.C.3.

groundless. The rules on the admissibility of character evidence were designed not to protect victims or witnesses, but rather to protect defendants.¹⁰¹ The argument that the "playing field must be leveled" is tenuous at best because "tit-for-tat" is simply not a logical or reasonable basis for a legitimate legal argument. When the accused introduces evidence that the decedent was the first aggressor under FRE 404(a)(2), the prosecution may offer rebuttal testimony as to the character trait of peacefulness of the decedent.¹⁰² Because the deceased cannot testify to his peaceable character during the tragic occurrence, FRE 402(a)(2) provides that "whenever the accused claims self-defense and offers *any* type of evidence that the deceased was the first aggressor, the government may reply with evidence of the peaceable character of the deceased."¹⁰³ Thus, sufficient safeguards are built into the rule and the need for symmetry is not a valid argument.

The prosecution is also allowed to introduce specific act evidence of the accused under FRE 404(b) for "other purposes."¹⁰⁴ Although the jury is admonished not to consider the evidence for a forbidden purpose, the jury is left to infer that the prior bad acts of the accused are in conformity with his character. Justice Weltner, in concurrence with the majority in *Lolley v. State*,¹⁰⁵ noted that the reasons for the rule disallowing specific act evidence would also "militate against admission of evidence of similar crimes on the part of an accused, which is admissible to show 'identity, motive, plan, scheme, bent of mind and course of conduct.'"¹⁰⁶

IV. REJECTION OF THE FEDERAL RULES FRAMEWORK

Based on the compelling policy arguments for admitting specific act evidence of a decedent's violent character, a growing number of jurisdictions have either totally rejected the Federal Rules approach or have developed compromise solutions. These solutions recognize that specific act evidence should be admissible under certain circumstances or in certain types of cases. These jurisdictions have concluded that any potential prejudice to the decedent

101. See *supra* note 36 and accompanying text.

102. See GRAHAM, *supra* note 2, at § 5.8.

103. MCCORMICK, *supra* note 35, at § 193.

104. FRE 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

105. 385 S.E.2d 285, 287 (Ga. 1989) (Weltner, J., concurring).

106. *Id.* at 287 n.1 (quoting *Wallace v. State*, 273 N.E.2d 143 (1980)).

or the state must bow to an accused's paramount interest in presenting a defense.¹⁰⁷

A. Total Rejection of Federal Rules Approach: Significant Legislation and Litigation Involving the Admission of Specific Act Evidence of the Decedent's Character for Violence

California and Wyoming have adopted legislation allowing specific act evidence to be admitted to circumstantially prove the decedent's character. Although California has not adopted the Federal Rules of Evidence, California's evidence code specifically provides that in criminal cases specific act evidence is admissible by an accused to prove conduct in conformity with the victim's character or trait of character.¹⁰⁸

By contrast, Wyoming has adopted the Federal Rules of Evidence, but has amended its language to allow specific act evidence. Wyoming Rule of Evidence 405(b) provides: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or is in issue under Rule 404(a)(2), proof may also be made of specific instances of his conduct."¹⁰⁹ In the Wyoming Supreme Court Note to the rules, the court stated that "[t]he purpose of the added language in subsection (b) is to insure that the accused in assault or homicide cases may introduce evidence of specific instances of the victim's conduct to prove that the victim was the first aggressor."¹¹⁰

In Illinois, the courts have reasoned that the victim's aggressive or violent character is relevant to establish the initial aggressor when the accused claims self-defense. Proof of character may include specific acts of violence for which the accused was unaware, including the victim's past convictions for crimes of violence.¹¹¹ Moreover, Illinois case law allows other types of specific bad act evidence not resulting in a conviction to be admitted, as well as applying the rule in cases other than homicide.¹¹² Illinois has not adopted the Federal Rules, but instead has followed an approach of almost total inclusion of specific act

107. See Larsen, *supra* note 36, at 692 (citing *United States v. Greschner*, 647 F.2d 740, 742 n.1 (8th Cir. 1981), where the court allowed the accused to present evidence of a victim's violent character. The court stated that "[t]he reason that [evidence of] prior convictions are disfavored . . . is not that they are irrelevant, but that they may be extremely prejudicial. In the instant case, there was no issue of prejudice since [the victim] was neither a defendant nor a witness.").

108. CAL. EVID. CODE § 1103(a).

109. WYO. R. EVID. 405. The language allowing the admissibility of specific act evidence was added in 1977.

110. *Id.*, Supreme Court Note.

111. See *Lynch v. State*, 470 N.E.2d 1018, 1020-21 (Ill. 1984). A host of later decisions have applied and extended this rule. See MacDonald, *supra* note 5, at 207. After examining Illinois law in detail, MacDonald concludes that Illinois should abandon its current broad rule that allows specific act evidence to prove the decedent's violent character. *Id.* at 224.

112. See MacDonald, *supra* note 5, at 207-08.

evidence.¹¹³

B. Significant Litigation Allowing the Admissibility of Specific Act Evidence of the Decedent's Character for Violence Under FRE 405(b) as an "Essential Element"

Under FRE 405(b), "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may. . . be made of specific instances of that person's conduct."¹¹⁴ Some courts reason that a decedent's violent or aggressive character is an "essential element" of the accused's self-defense claim, and thus allow the accused to introduce specific act evidence to prove this character.¹¹⁵

Alaska courts have held that specific instances of a decedent's prior violent conduct are admissible to prove initial aggressor, and the accused's knowledge of the prior specific acts is immaterial. In *Byrd v. State*,¹¹⁶ the Alaska Supreme Court held in a homicide case that

[e]vidence of the victim's violent nature . . . may be relevant to a claim of self defense in two ways. First, it may be relevant to show whether the victim or the accused was the initial aggressor. Second, it may be probative on the question of the reasonableness of the accused's apprehension of being in imminent danger from the victim. . . . Under the Alaska Rules of Evidence[, Rule 405(b)] . . . the evidence is admissible for both purposes.¹¹⁷

113. See *id.* at 217.

114. FED. R. EVID. 405(b).

115. See *infra* notes 116-21; see also *Thompson v. State*, 813 S.W.2d 249, 251 (Ark. 1991); *State v. Dunson*, 433 N.W.2d 676, 680-81 (Iowa 1988); *People v. Boles* 339 N.W.2d 249, 252 (Mich. App. 1983) (admitting specific acts under theory that the victim's character is an essential element of self-defense, but limiting admissibility to those acts that the defendant had personal knowledge of at the time of the occurrence); *Green v. State*, 614 So.2d 926, 934 (Miss. 1992) (admitting specific violent acts as character evidence to demonstrate the accused's state of mind); *Heidel v. State*, 587 So.2d 835 (Miss. 1991) (admitting specific prior violent acts committed by the victim against the accused as an "essential element" of the accused's self-defense claim); *State v. Sims*, 331 N.W.2d 255 (Neb. 1983) (admitting specific acts of conduct where character is an essential element of the defense; and holding that when an accused claims the victim was the aggressor, the trial court will commit error in not admitting the testimony); *State v. Koon*, 440 S.E.2d 442, 450 (W. Va. 1983).

116. 626 P.2d 1057 (Alaska 1980).

117. *Id.* at 1058. See also *Amarok v. State*, 671 P.2d 882 (Alaska Ct. App. 1983) (admitting specific instances of the victim's prior conduct in an assault case under Alaska Evidence Rule 405(b) to show (1) who attacked first, in which case defendant's knowledge of the incident is immaterial; and (2) that the defendant acted reasonably in using the degree of force he did, in which case the defendant must know of the victim's past acts of violence).

In *Gottschalk v. State*,¹¹⁸ the Alaska Court of Appeals held that under Rule 405(b), the accused may admit evidence of specific instances of the victim's conduct when a character trait of the decedent is an "essential element" of a defense.

Texas law also allows homicide defendants to introduce a decedent's prior acts of violence and aggression to prove initial aggressor under the theory that the decedent's character is an "essential element" of the defendant's self-defense claim.¹¹⁹ In *Gonzales v. State*,¹²⁰ the court held that under 405(b) of the Texas Rules of Criminal Evidence specific bad acts are admissible in cases in which the character of a person is an "essential element" of a charge, claim, or defense and that a victim's aggressive character is an essential element of the claim of self-defense.¹²¹

This "essential element" approach has the advantage of protecting an accused from unfair prejudice by allowing probative evidence to be admitted. It also safeguards an accused's right to present a defense and upholds the truth finding function of our adversarial system. Allowing this evidence should also not be a surprise to prosecutors in these jurisdictions.

However, this approach has been criticized by courts and commentators¹²² as an improper reading of the Federal Rules because the decedent's prior violent acts are not an "essential element" of the self-defense claim, but instead are merely a circumstantial link in an accused's chain of proof.¹²³ In *United States*

118. 881 P.2d 1139, 1143 (Alaska Ct. App. 1994).

119. See *Gonzales v. State*, 838 S.W.2d 848, 859 (Tex. Ct. App. 1992).

120. 838 S.W.2d 848 (Tex. Ct. App. 1992).

121. *Id.* at 859.

122. See WIGMORE, *supra* note 19, at 1382-83 (1983). Professor Wigmore noted:

[C]onstrued literally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary act of aggression against the defendant, which is to say that the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue. . . . Nevertheless, . . . courts often fail to follow the logic of the distinction just described—though repeatedly chastised by scholars of evidence for failing to do so—and not infrequently courts have said . . . that character is "in issue" when such is not the case according to the logic described above.

Id.

123. See *Horton*, *supra* note 30, at 460; see also *Adams*, *supra* note 3, at 401-06. *Adams* discusses the Iowa Supreme Court's decision in *State v. Dunson*, 433 N.W.2d 676 (Iowa 1988), which held that specific act evidence of the decedent was admissible as an essential element of the defendant's self-defense claim under FRE 405(b), and such evidence was relevant under FRE 404(a)(2). *Id.* at 403. He disagrees with the holding and notes that prior cases had refused to extend the admission of specific act evidence for the purpose of establishing self-defense. *Id.* at 402.

v. Keiser,¹²⁴ the Ninth Circuit concluded that the language of FRE 405(b), the holdings from other circuits, and the theory supporting admission of victim character evidence led to the conclusion that victim character evidence admitted to support a claim of self-defense should be restricted to reputation or opinion evidence.¹²⁵ The court recognized that the lack of uniformity of decisions among the circuits stemmed largely from failure to read the rule and the advisory committee's notes in a straightforward manner.¹²⁶

Despite these criticisms, several state courts still adhere to the "essential element" approach. The manipulation of the text of 405(b) by these courts highlights the struggle some courts have with disallowing specific act evidence. This alternative also illustrates the length courts are willing to go to admit specific act evidence.

C. *Compromise Solutions*

Based largely on the compelling policies supporting the admissibility of specific act evidence, many jurisdictions have developed compromise solutions that recognize an exception to the general rule that the decedent's prior bad acts may not be used to prove his character. There are several approaches that courts, currently following the Federal Rules framework, could adopt that lie between the extremes of total exclusion and total inclusion.¹²⁷

1. *Connecticut/Utah Rule: Specific Act Evidence Admissible in the Form of Prior Convictions for Violent Crimes.*—One compromise solution adopted in several jurisdictions including Connecticut,¹²⁸ Utah,¹²⁹ Kansas,¹³⁰ and

124. 57 F.3d 847 (9th Cir. 1995).

125. *Id.* at 855.

126. *Id.* The court looked at the language of FRE 405(b) and strictly construed its terms. The court stated, "[t]he relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation." *Id.* at 856.

127. See MacDonald, *supra* note 5, at 218.

128. See *infra* notes 139-48 and accompanying text.

129. See *infra* note 147 and accompanying text.

130. See, e.g., *State v. Alderson*, 922 P.2d 435, 448 (Kan. 1996) (holding that specific act evidence shown by a conviction of a crime will be allowed, but the trial court must be aware of the surrounding circumstances of the prior conviction to be able to determine if it has any relevance to proving the defendant acted in conformity with this character trait); *State v. Deavers*, 843 P.2d 695 (Kan. 1992), *cert. denied*, 508 U.S. 978 (1993) (holding that when a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, to the limitation that evidence of specific instances of conduct shall only be proved by evidence of conviction of a crime); *State v. Mason*, 490 P.2d 418 (Kan. 1971) (holding that where self defense is an issue in a homicide case, evidence of the deceased's violent character is admissible; such evidence may consist of the general reputation of the deceased in the community, but specific instances of misconduct may be shown only by evidence of conviction of a crime).

Pennsylvania,¹³¹ involves restricting the type of proof of a decedent's prior specific acts of violence.¹³² In these jurisdictions, evidence of a decedent's prior violent or aggressive behavior is admissible only in the form of recent prior convictions for a violent criminal offense.¹³³ This is true regardless of whether the accused knew of the decedent's violent character. The value of this approach is that "juries are not exposed to inflammatory testimony of dubious substantive value, the express purpose of which is to justify the allegedly criminal action."¹³⁴ Moreover, past convictions for violent crimes are inherently more trustworthy, reliable and less unfairly prejudicial to either the accused or the state than testimony of eyewitnesses to other specific acts of violence.¹³⁵ In *Commonwealth v. Amos*,¹³⁶ the court held that an accused may introduce the criminal record of the deceased to show the violent propensities of the decedent to prove that he was in fact the aggressor.¹³⁷ The court reasoned that "the reasons usually marshalled in limiting proof of character as to a defendant—the possibilities of (1) arousing prejudice, (2) surprising the defendant, (3) confusing the jury, and (4) consuming time—do not obtain as to a victim."¹³⁸

In *State v. Miranda*,¹³⁹ the Connecticut Supreme Court held that in homicide cases where the accused claims self-defense, she may show that the decedent was the initial aggressor "by evidence of the deceased's convictions of crimes of violence, irrespective of whether the accused knew of the deceased's violent character or of the particular evidence adduced at the time of the death-dealing encounter."¹⁴⁰ The court limited the scope of the admissibility of this evidence by preventing the accused from introducing the entire criminal history of the decedent solely to disparage his general character.¹⁴¹ Thus, only convictions for violent crimes are admissible. Additionally, the accused is not permitted to introduce all convictions for violent crimes. They must not be remote in time or too dissimilar in nature from the current incident.¹⁴² The court admonished that "[i]n each case the probative value of the evidence of certain convictions rests in the sound discretion of the trial court."¹⁴³

In *State v. Smith*,¹⁴⁴ the Connecticut Supreme Court offered another advantage for the rule that specific violent acts resulting in a conviction may be

131. See *infra* notes 136-38 and accompanying text.

132. See Horton, *supra* note 30, at 458.

133. See *id.*

134. *Id.*

135. See *id.*

136. 284 A.2d 748, 751 (Pa. 1971).

137. *Id.*

138. *Id.* at 752.

139. 405 A.2d 622 (Conn. 1978).

140. *Id.* at 625.

141. *Id.*

142. See *id.*

143. *Id.*

144. 608 A.2d 63 (Conn. 1992).

used to prove the decedent's violent character. The rationale underlying this rule is that "the dangers of injecting collateral issues confusing to a jury and prolonging the trial are minimal when only convictions may be admitted."¹⁴⁵ The court reasoned that a conviction provides indisputable evidence of the commission of a violent act while an arrest or indictment "is a mere accusation, not a settled disposition, and, as such, would invite dispute over collateral issues at trial."¹⁴⁶ This approach eliminates the systemic concerns advanced by proponents of the Federal Rules approach because evidence of a prior conviction is not likely to be fabricated.¹⁴⁷ The accused is also not allowed to admit the facts underlying the decedent's convictions for the violent crime(s) because of the potential of prejudice or misleading the jury.¹⁴⁸ Thus, this rule eliminates the concerns of injecting prejudice into the proceedings and creating trials within trials.

2. *District of Columbia Rule: Specific Act Evidence Allowed Only in Homicide Cases.*—A second compromise solution involves limiting the types of cases in which proof of a decedent's prior violent acts may be introduced.¹⁴⁹ This rule allows specific act evidence, which is not limited to prior convictions for violent crimes, to be introduced in homicide cases.¹⁵⁰ The accused is allowed to admit any relevant prior violent acts of the decedent to establish that the decedent was the initial aggressor. In *Harris v. United States*,¹⁵¹ prior violent acts of the decedent were held to be admissible to prove who attacked first only in homicide cases.¹⁵² The court recognized this holding was an exception to the general rule precluding specific evidence of any prior wrongs to prove action in conformity with earlier conduct. But, it carved out the exception due to the absence of the

145. *Id.* at 72.

146. *Id.* at 73.

147. See MacDonald, *supra* note 5, at 220. See also *State v. Howell*, 649 P.2d 91, 96 (Utah 1982), where the court held that specific act evidence was admissible in the form of recent prior convictions for violence. The court stated that there were "many well-reasoned cases" holding that the accused in homicide cases claiming self-defense may prove specific incidents of prior violent conduct on the part of the victim to establish the character of the victim for turbulence and violence. Yet, the court said that Utah

has opted for a more limited type of evidence than can be used to prove specific instances of misconduct. To prevent the trial from being drawn off into pathways collateral to the central issue of guilt, Rules 46 and 47 of Utah Rules of Evidence do not permit evidence of specific acts of violence, short of criminal conviction, to prove the deceased's violent character.

Id.

148. See *State v. Maxwell*, 618 A.2d 43, 48-49 (Conn. App. Ct. 1992), *cert. denied*, 509 U.S. 930 (1993).

149. See Horton, *supra* note 30, at 458-59.

150. See *id.*

151. 618 A.2d 140 (D.C. 1992).

152. *Id.* at 144.

decedent's testimony at trial and the need to protect the accused.¹⁵³

This solution "maximally protects a defendant's due process rights to defend against criminal prosecution where the defendant stands to lose life or liberty."¹⁵⁴ The broadest protection is given to the accused in cases where the stakes and the stigma of a murder conviction are the highest.¹⁵⁵ Where these considerations are not present, for instance, in assault or battery cases, the accused is limited to using opinion or reputation testimony to establish that the victim was the probable aggressor.¹⁵⁶

A potential drawback to this solution is that specific evidence of prior violent acts is not limited to prior convictions for violent offenses. Thus, the systemic concerns that support the exclusion of specific act evidence are implicated, namely the potential for the jury being confused and misled by collateral issues.¹⁵⁷ Opponents also argue that such testimony may be open to fabrication. However, with careful judicial scrutiny, these concerns are eliminated.

3. *Georgia Rule: Specific Act Evidence Allowed Upon Proper Notice to Prosecution.*—This approach is similar to the above compromise solutions, however, it offers more protection to the state because the defense is required to give notice of its intent to use prior specific acts of violence. The Georgia rule allows the accused to introduce evidence of specific acts of violence by a victim against third persons when the accused claims self-defense. Yet, the Georgia Supreme Court in *Chandler v. State*¹⁵⁸ imposed the restriction that the defense must notify the trial court of its intent to admit specific violent acts by the decedent to prevent unfairness to the state.¹⁵⁹

In 1991, the *Chandler* court overturned the long-standing rule in Georgia prohibiting the admission of evidence by the accused of specific acts of violence by the victim to prove that the victim's bad character conformed to this violent trait.¹⁶⁰ The court was convinced that the former rule should be abolished and adopted the reasoning of Justice Weltner in his concurrence in *Lolley v. State*.¹⁶¹ The court stated: "In his special concurrence to *Lolley*, Justice Weltner cogently explained why this Court ought to change the rule. We now find his reasoning persuasive and hold that . . . evidence of specific acts of violence by a victim against third persons shall be admissible where the defendant claims justification."¹⁶²

The court placed strict limitations on the introduction of specific act evidence of violence by the decedent against third persons. Prosecutors are required to

153. *Id.*

154. Horton, *supra* note 30, at 458.

155. *See id.* at 459.

156. *See id.*

157. *See supra* notes 56-62 and accompanying text.

158. 405 S.E.2d 669 (Ga. 1991).

159. *Id.* at 673-74.

160. *Id.* at 673.

161. *Id.* (citing *Lolley v. State*, 385 S.E.2d 285 (Ga. 1989)). *See also supra* note 25.

162. *Id.* (citing *Lolley*, 385 S.E.2d at 288 (Weltner, J., concurring)).

give advance notice to the defense of their intention to use evidence of similar transactions or occurrences because of fundamental fairness to the accused, and the fact that it is difficult to rebut evidence of specific acts unless timely notice is given.¹⁶³ The court reasoned that permitting the defense to introduce evidence of specific acts of violence by the decedent without advance notice to the state would similarly result in unfairness to the state. Thus, "curative procedures" were necessary to "avoid a battle by surprise."¹⁶⁴

The primary benefit of this rule is protection of the accused's life and liberty interests and her ability to present a defense. Furthermore, the rule avoids any potential prejudice and surprise to the state by requiring advance notice of an intent to introduce prior violent acts. The state only has to prepare to rebut the prior bad acts to which it has been given notice. The systemic concerns are also lessened by this approach due to judicial scrutiny.

V. ANALYSIS: A NEW UNDERSTANDING OF SPECIFIC ACT EVIDENCE

No one would seriously argue that the victim should be put on trial. Nor would one advocate that the "victim got what he deserved." However, a defense attorney is often faced with these unfair criticisms, as well as the charge that she is using "dirty tactics" to get her clients off by even suggesting that the decedent may have been responsible for his own demise when the accused used reasonable force in defense of herself. Our adversarial system of justice is designed to ascertain the truth of a historical event. Although a defense attorney need not present any evidence because the burden of proof is on the state, a defense attorney faced with evidence of the truth has an obligation to bring this evidence before the jury. Because specific act evidence is inherently more credible and convincing to a jury than opinion or reputation evidence,¹⁶⁵ the failure to allow such evidence is improper. Ignoring the highly probative value that this type of evidence possesses does not further the truth-finding function of our adversarial system. It also fails to give the accused the freedom necessary to prepare an adequate defense.

Consider the following argument:

[S]omewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it You expect the trial to be a search for the truth; you find that it is a performance orchestrated by lawyers and the judge, with the jury hearing only half the facts The jury is never told that the *defendant* has two prior convictions for the same offense and has been to prison three times for other crimes.¹⁶⁶

163. See *id.*

164. *Id.* at 674.

165. See *supra* note 43 and accompanying text.

166. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, Gov. Doc. No. Pr 40.8: V66/F49, at vi, 9 (1983), quoted in Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful*

The word “decendent” could just as easily be substituted here. The argument cuts both ways. The truth-finding function of the criminal justice system is similarly undermined when an accused claims the decedent was the initial aggressor and is not allowed to tell the jury of the decedent’s character for violence and turbulence.

Moreover, fundamental unfairness can result by not allowing specific act evidence of the decedent’s violent character to be admitted when the accused claims the decedent was the initial aggressor. Currently, there are a range of approaches used by the states that result in an accused’s fate being determined largely on which jurisdiction she is brought to trial, and which evidentiary scheme prevails in that jurisdiction. Thus, two different cases with strikingly similar facts will be decided in different ways depending upon the approaches utilized in the particular jurisdictions. One defendant may be acquitted because of the introduction of specific act evidence and another defendant may be executed.

In light of the overwhelming interest afforded criminal defendants to fully present a defense, admissibility of prior specific violent acts by the decedent should be allowed. In a homicide case, the accused stands to lose both her life and her liberty interests. The punishment for homicide is severe—usually a life sentence or death. An innocent person has a fundamental right to be protected from having these interests violated. In view of the severe and punitive sanctions of life imprisonment or death that the state seeks against an accused charged with murder, this evidence should be admissible. The moral and community condemnation a person faces is also greater in homicide cases than in assault or battery cases. Thus, the strong social stigma attached to being convicted of murder justifies a rule allowing the admissibility of specific act evidence.

The following three basic policies underlie our adversarial system: (1) the need to provide justice in individual cases, (2) the need to ensure equal justice among like cases, and (3) the need to perform both of these functions without overloading the system so that no justice results at all.¹⁶⁷ These policies necessitate the admissibility of specific act evidence in homicide cases where the accused seeks to prove circumstantially that the decedent was the initial aggressor. However, under the current framework followed by a majority of the states it is questionable whether these policy goals are being advanced. In order to fully accommodate these fundamental policies, the states must take a hard look at their current framework and ask if it is striking the proper balance between competing policy considerations.

There is no sound reason why proof of a decedent’s character should not be admitted to establish expected and foreseeable conduct. Society’s experience leads us to expect characteristic conduct of individuals to be repeated.¹⁶⁸ Thus, there is no reason for failing to allow a prior similar action to be admitted as

Disposition Exception, 29 SUFFOLK UNIV. L. REV. 515, 515 (1995) (emphasis added).

167. See *supra* note 71 and accompanying text.

168. See Urviller, *supra* note 77, at 847-48.

evidence of the behavior in question.¹⁶⁹ "Proof, in court at least, is supposed to be a matter for the application of ordinary intelligence, and any rule in derogation of common sense requires special justification."¹⁷⁰ Ultimately, the Federal Rules of Evidence approach is an obstruction to justice and a fair trial when it should be seeking to promote justice and fairness in individual cases.

The argument that specific act evidence should not be admissible because it might mislead the jury, thereby resulting in an acquittal because the decedent "got what he deserved," is based on a deep distrust of the jury and on the assumption that the jury is ignorant.¹⁷¹ It assumes that the jury cannot properly use the character evidence for its intended purpose, namely to establish that it is more probable that the decedent was the initial aggressor. It further assumes that the jury has a spiteful motive against the decedent.

However, the rules on the admissibility of character evidence were designed not to protect victims, but rather to protect the accused. Because the decedent is not on trial and is not available to testify at trial as to his character for peacefulness, the specific act evidence of the decedent's violent character is admitted for the purpose of corroborating the accused's initial aggressor theory. In a homicide case where there are no eye-witnesses and the accused is not allowed to corroborate her claim with character evidence, many defendants in effect have no defense. Because the decedent is dead, he cannot take the stand to prove his peaceful character or explain what happened. The accused is deprived of the opportunity to cross examine the decedent as to his credibility and veracity. Although the accused may introduce opinion or reputation evidence, these methods of proof are not as convincing to a jury, and often not as reliable.¹⁷² It is illogical to allow a string of character witnesses to testify that the decedent was reputed to be, or in the witness' opinion was, a violent, dangerous, or aggressive person, but not to allow persons with first hand knowledge about the decedent's prior bad acts to testify. A person charged with homicide should have the ability to put on the best evidence available to her. In most cases, this will be specific act evidence. The jury's role is that of fact-finder. It weighs the credibility of witnesses and determines the truth of the facts. Where there are no eye-witnesses, the jury cannot ascertain the truth directly. It must determine the truth from other available facts. The best evidence available in these cases is specific act evidence of the decedent's violent character that tends to make it more probable to the jury that the decedent acted in conformity with this character.

There are sufficient safeguards in the rules to protect the decedent and prevent unfair prejudice to the prosecution. When the accused introduces evidence that the decedent was the initial aggressor, under the rules, the prosecution may offer rebuttal testimony as to the character trait of peacefulness

169. See *id.* at 848.

170. *Id.*

171. See *supra* notes 88-89 and accompanying text.

172. See *supra* note 43 and accompanying text.

of the decedent.¹⁷³ This is true regardless of whether the accused used reputation, opinion or specific instance evidence of the victim's propensity for violence.¹⁷⁴

Additionally, the judge has the discretion under FRE 403¹⁷⁵ to balance the prejudicial nature of the evidence against its probative value.¹⁷⁶ If the accused attempts to introduce specific act evidence that is remote in time or unrelated to the determination of initial aggressor, the judge may exclude the evidence as raising too many collateral issues. The judge may similarly conclude that the defense is presenting the specific act evidence with too many witnesses. In these cases, the judge may find that the evidence would confuse or mislead the jury or result in "undue delay, waste of time, or needless presentation of cumulative evidence."¹⁷⁷ A per se rule prohibiting specific act evidence in such cases is unnecessary because the judge has the discretion to prevent the trial from becoming a circus. Therefore, the question presented by these cases simply is an ordinary relevancy issue.

VI. RECOMMENDATION

A. Amend FRE 405 and Allow All Types of Specific Act Evidence

Ultimately, the best approach to guard against prejudice to the accused would be for states to amend their evidence rules to allow any relevant prior specific acts of violence by the decedent in homicide cases where the accused claims the deceased was the initial aggressor. States that are troubled by the current Federal Rules framework should follow the lead of the District of Columbia that allows any type of specific instances of violent conduct by the decedent in homicide cases.¹⁷⁸ Such evidence is relevant under FRE 401 regardless of whether the evidence is used to prove character.¹⁷⁹ Under this approach, the judge is free to determine in individual cases whether the prejudicial nature of the evidence outweighs its probative value under FRE 403.¹⁸⁰

To accomplish this result however, FRE 405(a)¹⁸¹ must be amended to allow admission of specific act evidence. Currently, the rule excludes this form of evidence even though courts and commentators agree that the victim's character

173. See GRAHAM, *supra* note 2.

174. See *id.*

175. See *supra* note 13.

176. FED. R. EVID. 403.

177. *Id.*

178. This recommendation is, in effect, the rule followed by the District of Columbia that allows specific act evidence under an initial aggressor theory in homicide cases. Yet, the District of Columbia Rule is followed without an amendment to FRE 405. See discussion *supra* Part IV.C.2.

179. See *supra* notes 37-41 and accompanying text.

180. See *supra* note 13.

181. See *supra* note 42.

is relevant evidence.¹⁸² The rule allows only reputation or opinion evidence to prove character. Under FRE 405(b), specific act evidence is limited to cases where "character . . . is an essential element of a charge, claim, or defense."¹⁸³ States can be guided by the direction of Wyoming that has amended its evidence rules to allow specific act evidence to prove that the victim acted in accordance with his violent nature at the time of the occurrence.¹⁸⁴ FRE 405 should similarly be amended to allow specific act evidence when character is relevant to establishing a proposition of fact in the case.

This recommendation strikes the proper balance between competing policy considerations. The idea of allowing specific act evidence of the decedent's violent character only in homicide cases has a legitimate policy basis because it affords the accused the greatest protection where the stakes are the highest and when she has the most to lose. The gravity and stigma of a conviction for homicide, as well as the right of an accused to present an adequate defense, justifies such an approach. A potential disadvantage of this recommendation is that evidence of prior violent acts is not limited to prior convictions of the decedent, which may cause collateral issues to be raised. However, the compelling policies of ascertaining the truth and protecting an accused's life and liberty interests, mandate that equity be exalted over efficiency. Moreover, because the judge has the discretion to carefully scrutinize the probative value of the evidence, the potential prejudice to the prosecution and the number of collateral issues being raised will be minimized. This alternative eliminates the concerns of introducing prejudice into the proceedings and creating trials within trials. Finally, if this approach is combined with the Georgia rule,¹⁸⁵ which requires notice by the defense to the prosecution of its intent to rely on specific act evidence, then a proper balance between the competing policies and interests would also be struck. The prosecution would not suffer any prejudice nor be caught off guard because it only has to prepare to rebut the prior bad acts to which it has been given notice.

B. Adopt Compromise Solution of Limiting Specific Act Evidence to Prior Convictions

A less drastic step than amending FRE 405 to allow any prior bad act evidence would be for the states to adopt the Connecticut/Utah rule¹⁸⁶ which limits specific act evidence to prior convictions for violent crimes. This approach has been embraced by a number of jurisdictions and offers greater protection to the accused than the current Federal Rules framework. Although the Connecticut/Utah rule has the benefit of preventing fabrication as well as reducing the potential for raising numerous collateral issues that may mislead a

182. See *supra* notes 35-38 and accompanying text.

183. FED. R. EVID. 405(b).

184. See *supra* notes 109-10 and accompanying text.

185. See discussion *supra* Part IV.C.3.

186. See discussion *supra* Part IV.C.1.

jury and lengthen a trial, this solution does not go far enough in some cases to protect the accused. For instance, the decedent may be an extremely violent and aggressive person but have no prior convictions for such acts. In such cases, it is preferable to allow the accused to introduce prior violent acts by the decedent against third persons where no conviction resulted. Nevertheless, the Connecticut/Utah rule is an equitable approach because it properly weighs the competing policies and strikes a fair balance. Thus, if states are reluctant to amend their evidence rules to allow any specific bad act evidence, this solution is an equally good alternative to adopt.

CONCLUSION

The apparent lack of balancing of competing policies by the framers of the Federal Rules of Evidence works a significant hardship on the accused who claims that the decedent was the initial aggressor. The proponents simply provide a list of interests that must be adhered to in dealing with character evidence of the decedent. Yet, these interests are stated in a conclusory manner and are seemingly not balanced against other compelling policy goals. For instance, the courts and commentators list the following concerns as reasons for excluding specific act evidence: time consumption, misleading and distracting the jury, and unfair surprise to the prosecution. But, they fail to follow a balancing approach. It is not enough to merely give a list of interests supporting one side. Rather, there must be a balance between competing policies. This is especially true in homicide cases where the stakes are highest. Additionally, many of the concerns expressed by proponents of the Federal Rules approach are simply unfounded.

The lack of balance between competing interests works a significant hardship on the ability of an accused to present a defense. The *per se* rule adopted by the Federal Rules prejudices the accused by preventing her from introducing specific act evidence when she claims the decedent was the initial aggressor. Deprived of the best evidence available to defend herself, the accused's paramount life and liberty interests are relinquished in favor of a rule placing more emphasis on efficiency. The truth-finding function of the criminal justice system is eroded by prohibiting the accused from introducing specific act evidence that would promote the pursuit of truth. A growing minority of jurisdictions refuse to allow the result reached under the Federal Rules approach. To varying degrees, these courts have rejected the Federal Rules approach by admitting specific act evidence when the accused claims the decedent attacked first. They have struck the proper balance. Other states should follow their lead.

COMPLIANCE UNDER ERISA SECTION 404(C) WITH INCREASING INVESTMENT ALTERNATIVES AND ACCOUNT ACCESSIBILITY

KEITH R. PYLE*

INTRODUCTION

A common feature of today's retirement plans, especially the increasingly popular 401(k) plans,¹ is a provision for plan participants to direct the investment of assets in their accounts.² The number of investment options available to participants has increased, probably due to both technology and industry demand.³ While it seems advantageous to the participants in retirement plans to have the opportunity to direct their investments, it could lead to risks for both plan participants and the employers who sponsor such plans. The risk to participants is the investment risk that accompanies investment control. The risk to plan sponsors is fiduciary liability for investment losses if they do not meet all of the requirements of section 404(c) of the Employee Retirement Income Security Act of 1974 ("ERISA").⁴

While participants and plan sponsors may view their individual risks differently, they are not completely distinct. The risks derive from a determination of who is liable for losses in participants' account balances due to investment performance. If the plan complies with the requirements of ERISA section 404(c) and the underlying Department of Labor ("DOL") regulations, the plan sponsor obtains relief from liability for losses to participants' accounts and the plan participants bear the investment risk. If the sponsor maintains a participant-directed account plan, the sponsor should follow the rules set forth by ERISA section 404(c). However, this is not necessarily a simple task. The requirements of ERISA section 404(c) are extremely complex and may be difficult if not impossible to meet in plans which offer a large number of investment alternatives. The increasing use of automated telephone systems and computers as a form of communication may also make it difficult for plan sponsors to comply with some of the requirements of ERISA section 404(c).

This Note analyzes the requirements of ERISA section 404(c) and assesses the compliance difficulties facing plans that offer a large number of investment alternatives and/or automated interaction by plan participants. The risks to participants in such plans are analyzed by reviewing the original purpose of

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1. See, e.g., John Collins, *Watch Out for Hidden Risks in 401(k) Plans*, DALLAS BUS. J., May 23, 1997, at 12B.

2. See 26 U.S.C. § 401(k) (1994 & Supp. II 1996); Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974 (ERISA) [hereinafter *Interpretive Bulletins*], 29 C.F.R. § 2509.96-1 (1998).

3. *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1 (1998).

4. ERISA § 404(c), 29 U.S.C. § 1104(c) (1994 & Supp. II 1996).

ERISA to determine if current regulations and practices are promoting that purpose. Finally, this Note proposes changes to the ERISA regulations and DOL enforcement practices to better promote the interests of both plan participants and plan sponsors.

The changes most likely to occur with respect to participant-directed plans are adjustments to the notice, election, and disclosure requirements of ERISA and the Internal Revenue Code to accommodate the use of new technologies in plan administration. The Taxpayer Relief Act of 1997 ("the Act")⁵ calls for the Secretary of Labor to interpret the existing requirements to allow for the use of current technology while protecting the rights of participants and beneficiaries in such plans.⁶ The interpretive regulations called for by the Act are due to be published by the Secretary no later than December 31, 1998.⁷

I. COMPLIANCE UNDER ERISA SECTION 404(C)

Congress enacted ERISA in 1974 to regulate the private pension system. ERISA sets disclosure and reporting requirements for retirement plan sponsors

5. Taxpayer Relief Act of 1997 § 1510(a), Pub. L. No. 105-34, 111 Stat. 788, 1068-69 (1997).

6. *Id.* § 1510(a), 111 Stat. at 1068-69.

7. *Id.* at 1068. The Secretary of Labor published proposed regulations and invited public comments on the use of electronic communication and recordkeeping technologies by employee benefit plans on January 28, 1999. Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans, 64 Fed. Reg. 4506 (1999) (to be codified at 29 C.F.R. pt. 2520) (proposed Jan. 28, 1999). The proposed regulations set forth a safe harbor for delivering required disclosures via electronic media. *Id.* at 4507. Because the guidance is in the form of a safe harbor, plan administrators may rely on the proposed provisions when utilizing electronic delivery, but the proposed regulations are not the only means that may be used by a plan administrator using electronic delivery. *Id.*

The proposed regulations allow a plan administrator to utilize electronic items but include provisions to ensure participants receive the items in a form they can use. Under the safe harbor electronic disclosure provisions, the plan administrator must: (1) take steps to ensure actual receipt by participants; (2) conform to ERISA's style, format, and content requirements; (3) notify the participants of the importance of the electronic documents to be furnished; and (4) provide a paper copy of the document if the participant so requests. *See id.* at 4512. As a further safeguard, the participants must be able to access the electronic documents and print them at the participant's worksites. *See id.*

The proposed regulations are intended to apply to most required disclosure items of employee benefit plans. However, the precise scope is unclear because at least one type of disclosure item will not be able to be provided electronically. *See* Colleen T. Congel, *Pensions: Plans Should Continue to Provide Safe Harbor Notices on Paper, Official Says* [1999] DAILY TAX REP. (BNA), No. 57, at G-6 (Mar. 25, 1999). An IRS official has indicated that participant notices required by 401(k) plans that are intended to meet nondiscrimination safe harbors must continue to be given on paper. *See id.* Therefore, further clarification of the scope of the proposed regulations will be required.

and sets standards of conduct for plan fiduciaries.⁸ ERISA also sets standards for vesting of accrued benefits, minimum funding requirements, and termination of retirement plans.⁹ The underlying purpose of ERISA, however, is “to protect and strengthen the rights of employees, to enforce strict fiduciary standards, and to encourage the development of private retirement plans.”¹⁰

Section 404(c) of ERISA and the underlying DOL regulations specifically apply to plans that allow participants or beneficiaries to control the assets in their individual accounts.¹¹ If plan sponsors comply with section 404(c), then they enjoy relief from liability due to losses in participant accounts from the participant’s investment control.¹² While this section purports to give relief to plan sponsors, the sponsor will only receive the indicated relief by complying with the complex requirements governing selection of investment alternatives and disclosure of information to participants and beneficiaries. The stringent standards protect the interests of participants and beneficiaries while allowing them the freedom to control the investment of assets in their individual accounts. If plan sponsors could not obtain relief from losses due to a participant’s or beneficiary’s asset direction, the sponsors would have little incentive to implement a plan which allowed for participant-directed accounts.

Before looking at the specific requirements of section 404(c), it may be helpful to identify who is eligible for its relief. Liability relief pertains to plan fiduciaries.¹³ The plan sponsor is one such fiduciary and is the focus of this Note. The plan may specifically name other parties as plan fiduciaries, such as a plan administrator or investment managers. Third parties may obtain fiduciary status by exercising a certain degree of control over investment decisions relating to the plan assets.¹⁴ Section 404(c) applies to these other fiduciaries in the same manner as it does to plan sponsors; however, the language of section 404(c) specifically states that plan participants and beneficiaries do not become plan fiduciaries by exercising control over the investment of assets in their accounts.¹⁵ As a result, plan participants and beneficiaries need not worry about the liability that may result from a fiduciary breach simply because they exercise control over the assets in their own account.

ERISA section 404(c) applies to plans that allow participant-directed investments. It provides liability relief to plan sponsors from investment losses incurred by participants and beneficiaries who give investment direction. However, the requirements of ERISA and the DOL regulations that apply to

8. ERISA § 1(b), 29 U.S.C. § 1001(b) (1994).

9. 29 U.S.C. § 1001(c) (1994).

10. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (citing ERISA § 1, 29 U.S.C. § 1001; H.R. REP. NO. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-43).

11. 29 U.S.C. § 1104(c) (1994 & Supp. II 1996); Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404c-1(a)(1) (1998).

12. *See* 29 U.S.C. § 1104(c)(1)(B) (Supp. II 1996).

13. *See id.*; *see also id.* § 1002(21)(A) (1994) (defining plan fiduciary).

14. *See id.* § 1002(21)(A).

15. *Id.* § 1104(c)(1)(A) (Supp. II 1996).

section 404(c) must be met before relief is provided. An examination of the requirements should clarify how this section protects participants and beneficiaries as well as plan sponsors who implement participant-directed plans.

A. Opportunity to Exercise Control

The first requirement a plan must satisfy in order to obtain the fiduciary relief of section 404(c) is that the plan must offer the participants or beneficiaries the opportunity to exercise control over the assets in their individual accounts.¹⁶ The DOL regulations set forth two criteria to be met before a participant or beneficiary is deemed to have the opportunity to exercise control over his or her assets.¹⁷ First, the participant must have the opportunity to give instructions to an identified plan fiduciary who is obligated to comply with those instructions.¹⁸ To satisfy this requirement, the participant or beneficiary must be given the opportunity to receive written confirmation of the instructions.¹⁹ If an electronic medium is utilized in completing transactions, then the plan fiduciaries must ensure that they still give participants and beneficiaries the opportunity to receive the confirmation in writing, not electronically, or the plan fiduciaries may risk noncompliance.

The Taxpayer Relief Act of 1997 addresses ERISA compliance and the use of new technologies.²⁰ The Act calls for DOL regulations²¹ clarifying the types of paperless transactions which will satisfy the writing requirements under the Internal Revenue Code, but it fails to address the writing requirements of ERISA.²² If the DOL regulations do not include an interpretation of ERISA's writing requirements as well as those of the Internal Revenue Code, plan fiduciaries should be careful not to overlook this written confirmation requirement.

The second part of the opportunity to exercise control is the provision that each participant or beneficiary have the "opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments."²³ The regulations list many disclosure items, some of which must be given automatically by the plan fiduciaries and others that must be given only

16. 29 C.F.R. § 2550.404c-1(b)(1)(i) (1998).

17. *Id.* § 2250.404c-1(b)(2)(i).

18. *Id.* § 2550.404c-1(b)(2)(i)(A).

19. *Id.*

20. Taxpayer Relief Act of 1997 § 1510(a)(1), Pub. L. No. 105-34, 111 Stat. 788, 1068 (1997).

21. *See supra* note 7.

22. *Id.* The Act calls for regulations from the Secretary of Labor interpreting notice, election, consent, disclosure, and time requirements of both the Internal Revenue Code and ERISA in section 1510(a)(1), but only the writing requirements of the Internal Revenue Code are referenced for interpretation. *Id.*

23. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (1998).

upon request by a participant or beneficiary.²⁴ Among the automatic disclosures are: (i) limitations on when instructions may be given or transfers between investment alternatives may be made; (ii) identification of fiduciaries responsible for providing information on the investment alternatives to the plan participants and beneficiaries; (iii) risk and return characteristics of the different investment alternatives; (iv) applicable transaction fees; and (v) provision of a prospectus to a participant or beneficiary making an initial investment in a given investment alternative.²⁵ Items that must be disclosed upon request by a participant or beneficiary include: (i) a description of the operating expenses of the different investment alternatives; (ii) copies of prospectuses not required to be provided automatically; (iii) a list of assets which make up the portfolio of each investment alternative; and (iv) information about the value of shares or units of the different investment alternatives.²⁶

In providing any of the disclosure items discussed above, plan fiduciaries owe a duty of loyalty and prudence to plan participants and beneficiaries from which they receive no liability relief under ERISA section 404(c) in the event of a fiduciary breach.²⁷ The court in *In re Unisys Savings Plan Litigation* identified this duty by holding that “a fiduciary may not materially mislead those to whom [fiduciary] duties of loyalty and prudence are owed.”²⁸ The court then clarified that plan fiduciaries owe a duty of loyalty and prudence to plan participants by stating that “[a] plan administrator may not make affirmative material misrepresentations to plan participants” and “when a plan administrator speaks, it must speak truthfully.”²⁹ Ultimately the court in *Unisys* remanded the case to the district court to resolve questions of fact surrounding the alleged misrepresentations.³⁰ Nevertheless, the standards set by the court make it clear that fiduciaries owe a duty of loyalty and prudence when providing information about the investment alternatives available to plan participants.

B. Broad Range of Investment Alternatives

In addition to allowing participants and beneficiaries the opportunity to exercise control over their accounts, the plan must offer meaningful investment alternatives from which the participants and beneficiaries may choose. Thus, the participants and beneficiaries must be allowed to choose from a broad range of investment alternatives.³¹ The broad range requirement is satisfied only upon

24. *Id.* § 2550.404c(b)(2)(i)(B)(l)(i)-(viii).

25. *Id.*

26. *Id.* § 2550.404c-1(b)(2)(i)(B)(2)(i)-(v).

27. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 440 (3d Cir. 1996); ERISA § 401(a), 29 U.S.C. 1104(a) (1994).

28. *Unisys*, 74 F.3d at 440-41 (citations omitted).

29. *Id.* at 441 (quoting *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993)).

30. *Id.* at 448.

31. *See* 29 C.F.R. § 2550.404c-1(b)(1)(ii) (1998).

fulfillment of three conditions.³²

The first condition is that the investment alternatives provided allow the participant or beneficiary to have a material effect on the potential return from the amounts in his or her account.³³ The alternatives must also allow a participant or beneficiary to materially affect the degree of risk to which the invested amounts are subject.³⁴ This condition implies that the investment alternatives offered by the plan must present a wide range of risk and return characteristics. Only with such diverse risk and return characteristics would a participant or beneficiary be able to have a material effect on these aspects of his or her account by selecting from the different investment alternatives offered.

The second condition to the broad range requirement is that the plan provide at least three investment alternatives that have the following characteristics:

- (1) each alternative must be diversified;
- (2) each alternative must have materially different risk and return characteristics;
- (3) the alternatives must, when taken together, allow the participant or beneficiary to achieve a portfolio with risk and return characteristics at any point within a range that would be considered appropriate for the participant or beneficiary; and
- (4) each alternative, when combined with investments from the other alternatives, must tend to minimize through diversification the overall risk to the participant's or beneficiary's portfolio.³⁵

Any retirement plan that offers only a few carefully picked investment alternatives must ensure that the offered alternatives meet the above requirements. If a plan offers a large number of investment alternatives, it will likely have adequately diversified alternatives with a wide range of risk and return characteristics. However, characteristics (1) and (4) above apply to *each* investment alternative. These requirements cannot be satisfied by simply offering a large number of investment alternatives. Rather, offering a large number of investment alternatives will increase the likelihood that these diversification requirements will not be satisfied. In any event, each alternative that is offered by a plan should be reviewed independently to determine if it is sufficiently diversified to meet the above criteria. This type of independent evaluation is not likely to occur if a plan offers a virtually unlimited number of

32. *Id.* § 2550.404c-1(b)(3)(i).

33. *Id.* § 2550.404c-1(b)(3)(i)(A). The reference in the text to the participant's account appears to assume that a plan subject to ERISA section 404(c) always allows a participant or beneficiary to control the investments of his or her entire account. This assumption is not true. A plan subject to ERISA section 404(c) may allow participants or beneficiaries to control all or only a portion of the assets in their accounts. The distinction is omitted here for simplicity and because it is not important for the purposes of this Note.

34. *Id.*

35. *Id.* §§ 2550.404c-1(b)(3)(i)(B)(1)-(4).

investment alternatives,³⁶ which may be the case if the plan has a large mutual fund broker as an investment provider. Offering investment alternatives without proper evaluation puts the plan at risk of noncompliance and exposes the plan fiduciaries to the risk of liability for any investment losses to participant or beneficiary accounts.

The third condition to be satisfied in meeting the broad range of investments requirement is that the participants and beneficiaries must have the opportunity to diversify their accounts to minimize the risk of large losses, taking into account the nature of the plan and the size of the accounts involved.³⁷ In *Unisys*, the court addressed the question of how to determine whether this duty to diversify is satisfied in a given situation. The court looked to a congressional committee report that characterized the duty as one not to invest in “one type of security or in various types of securities dependent upon the success of one enterprise or upon conditions in one locality, since the effect is to increase the risk of large losses.”³⁸

The committee report quoted by the court spoke of the duty in terms of what the fiduciary should consider when *investing* plan assets rather than in selecting investments from which participants and beneficiaries could choose. The duty would presumably be the same for a fiduciary selecting investment alternatives for a participant-directed account plan because that was the type of plan involved in *Unisys*. The court further stated that the duty could not be quantitatively determined, but must be based on the facts and circumstances of each case.³⁹ The court then listed seven factors which should be considered in determining when the duty to diversify has been met.⁴⁰ The factors relate to the purpose and size of the plan, the nature and location of the employer’s business, and the type of investment under consideration.⁴¹ The court’s discussion of these factors suggests that appropriately diversified investment alternatives may vary from one plan to another. Again, it appears that offering an extremely large number of investment alternatives creates a substantial burden on the plan fiduciaries if the plan is to comply with ERISA section 404(c). This burden, as with all fund selection criteria, most likely extends beyond fund selection.⁴² Fiduciaries must monitor the investment alternatives to ensure that the selected alternatives remain

36. See, e.g., Thomas R. Hoecker & Nancy K. Campbell, *Participant Directed Investment Plans-Problems and Solutions*, in FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA—1996, Q245 A.L.I.-A.B.A. 211, 213.

37. 29 C.F.R. § 2550.404c-1(b)(3)(i)(C) (1998).

38. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 438 (3d Cir. 1996) (quoting H.R. REP. NO. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5085).

39. *Id.*

40. *Id.* The factors set forth in H.R. Rep. No. 93-1280 recognized by the court are: “(1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographic location; (6) distribution as to industries; [and] (7) the dates of maturity.” *Id.*

41. See *id.*

42. See Collins, *supra* note 1.

prudent.⁴³ Compliance under these criteria may be very difficult for a plan offering a large number of investment alternatives.

While the DOL regulations impose many disclosure burdens on plan fiduciaries, no obligation to provide investment advice is contained in the regulations.⁴⁴ In fact, giving too much advice could lead to additional liability by excluding transactions from the protection offered by section 404(c).⁴⁵ ERISA conveys fiduciary status to anyone who "renders investment advice for a fee or other compensation."⁴⁶ Because section 404(c) explicitly states plan fiduciaries have no obligation to give investment advice, there has been some concern that giving too much investment advice could lead to fiduciary liability not exempted by section 404(c).⁴⁷ However, the DOL addressed the situation by issuing guidance in 1996 distinguishing between "investment advice,"⁴⁸ which would not be protected by the section 404(c) liability exemption and "investment education," which would allow fiduciaries to stay within the exemption.⁴⁹

The distinction between investment "advice" and "education" depends on the facts and circumstances of each case.⁵⁰ While an analysis of where the line between "advice" and "education" should be drawn is beyond the scope of this Note, the distinction is based on the specificity of the information provided. Information about specific investments or giving recommendations is considered investment "advice"⁵¹ while general information about available investment alternatives or general investment concepts (including interactive materials such as worksheets and questionnaires) are considered investment "education."⁵²

Although the DOL interpretive bulletin provides some useful guidance about the types of information that a plan sponsor or investment provider could safely provide to the plan participants and beneficiaries, fiduciaries still have no *obligation* to provide any guidance to plan participants and beneficiaries regarding the investment of their retirement funds.⁵³ Presuming the majority of plan participants and beneficiaries have no training in investing or financial markets, requiring only disclosure of information such as risk and return characteristics and past performance of the investment alternatives along with a prospectus seems inadequate preparation for decisions that could have a substantial effect on the accumulation of a plan participant's retirement assets or

43. *See id.*

44. Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404c-1(c)(4) (1998).

45. *See* Joe Horton, *Walking the Fine Line of Employee Financial Advice*, AUSTIN BUS. J., Mar. 14, 1997.

46. ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii) (1994).

47. *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1(b) (1998).

48. *Id.* § 2509.96-1(c).

49. *Id.* § 2509.96-1(d).

50. *See id.* § 2509.96-1(c).

51. *Id.*

52. *Id.* § 2509.96-1(d).

53. *Id.* § 2509.96-1(b) n.1.

a beneficiary's income.

C. Independent Control in Fact

If a plan allows its participants and beneficiaries the opportunity to exercise control over their accounts and offers a broad range of investments as described in the previous two sections, the plan qualifies as an "ERISA section 404(c) Plan."⁵⁴ However, plan fiduciaries will receive liability relief under section 404(c) only if the participant or beneficiary has actually exercised independent control over the assets in his or her account.⁵⁵ Because relief from liability depends on the actions of individual participants, fiduciaries obtain relief on a participant-by-participant basis. The result for plan fiduciaries is that section 404(c) protection may be precluded on a plan-wide basis by not complying with the opportunity to exercise the control requirement and the broad range of investments requirement discussed above, but may only secure the protective relief with respect to each individual participant separately. In fact, a closer reading of the regulations suggests that relief is provided on a transactional basis rather than a participant basis.⁵⁶

Whether a participant or beneficiary has actually exercised independent control over a given *transaction* is determined by the facts and circumstances of each case.⁵⁷ The use of the word "transaction" in the DOL regulation further suggests that fiduciary liability relief is determined on a transaction-by-transaction basis.

While the regulations do not clearly indicate when a participant or beneficiary has exercised independent control, they do offer some guidance as to when independent control has *not* been exercised.⁵⁸ The exercise of control is not independent if (1) the participant or beneficiary is subject to improper influence by a plan fiduciary, (2) the plan fiduciary has concealed material facts regarding the particular investment, or (3) the participant or beneficiary is legally incompetent and the fiduciary accepting the instructions knows of the incompetence.⁵⁹

If the participant or beneficiary exercises independent control over the assets in his or her account, as mentioned earlier, the participant or beneficiary does not become a fiduciary.⁶⁰ However, the exercise of control by a participant or beneficiary alone does not provide the plan fiduciaries with relief from liability with respect to investment performance of the participant's or beneficiary's assets. The other requirements of ERISA section 404(c) must also be met. The

54. Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404c-1(b)(1) (1998).

55. *See id.* § 2550.404c-1(c)(1)(i).

56. *Id.* § 2550.404c-1(c)(2).

57. *Id.*

58. *Id.*

59. *Id.* §§ 2250.404c-1(c)(2)(i)-(iii).

60. *See id.* § 2550.404c-1(d)(1).

Third Circuit addressed this issue in *Unisys* as did a district court in *Conner v. Mid South Insurance Agency*.⁶¹ Although neither court was able to apply the final regulations due to the timing of the transactions involved,⁶² both courts concluded that actual independent control by a participant is not an absolute defense to a claim of fiduciary breach resulting in losses to the participant's account.⁶³

In *Unisys*, the plan sponsor argued that actual control by the participants (plaintiffs) over their assets was an absolute defense to the claim of a breach of fiduciary duty resulting in losses to the participants' accounts.⁶⁴ The court held that the fiduciary protection given by ERISA section 404(c) would not be afforded to the plan fiduciaries if the disclosure regarding the investment alternatives in question was insufficient.⁶⁵ The court reasoned that insufficient disclosure would preclude the participants from exercising actual control over their investment decisions.⁶⁶ The court struck down *Unisys*' claim that investment direction by participants created an absolute liability shield for the plan fiduciaries for losses due to poor investment performance in the participants' accounts.⁶⁷

In *Conner*, the court also held that the plan fiduciaries were not insulated from liability for their fiduciary breaches simply because a participant exercised control over the assets in his account.⁶⁸ As in *Unisys*, the events at issue occurred before the issuance of the final DOL regulations pertaining to ERISA section 404(c), so the court had only the language of ERISA to control the decision.⁶⁹ The court determined that some disclosure about the plan and the investment alternatives offered must be provided to plan participants before the plan fiduciaries may obtain the ERISA section 404(c) liability protection.⁷⁰ In finding no disclosure about fiduciary liability exemption or descriptions of the investment alternatives offered by the plan, the court held that the plan "[did] not fit into the scope of the exemption as it would have been commonly understood at the time of the [investment elections]" and, therefore, "[t]he Mid South plan's fiduciaries [were] not entitled to its protection."⁷¹

61. *Conner v. Mid S. Ins. Agency*, 943 F. Supp. 647, 659 (W.D. La. 1995).

62. In each case, the events that gave rise to the litigation occurred before the DOL regulations for section 404(c) were issued. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 444 n.21 (3d Cir. 1996); *Conner*, 943 F. Supp. at 659.

63. *Unisys*, 74 F.3d at 447; *Conner*, 943 F. Supp. at 659.

64. *Unisys*, 74 F.3d at 444-45.

65. *Id.* at 447.

66. *Id.* at 447-48.

67. *Id.*

68. *Conner v. Mid S. Ins. Agency*, 943 F. Supp. 647, 659-60 (W.D. La. 1995).

69. *Id.* at 659. However, the court acknowledged using the regulations for guidance in interpreting certain terms contained in the statutory language such as to "exercise" and "control." *Id.*

70. *Id.* at 660.

71. *Id.*

Although few cases address the issue,⁷² the propositions of the above cases, derived from the statutory language of ERISA, seem to be in accord with the DOL regulations. Participants and beneficiaries must be allowed the opportunity to exercise control over the assets in their accounts and actually exercise independent control before the fiduciary relief offered by section 404(c) will be extended to plan fiduciaries. The exercise of some asset direction by a participant or beneficiary does not provide an absolute defense to a claim of investment loss in a participant's or beneficiary's account.

II. POTENTIAL COMPLIANCE PROBLEMS

A. Disclosure and Fund Selection

Today, plan sponsors are offering an increased number of investment alternatives to participants and beneficiaries in participant-directed account plans.⁷³ This increase is facilitated by the use of computers and other forms of automated data transfer, which make it possible for plan sponsors to offer more investment alternatives for little additional cost. Another factor fueling the trend is that plan participants and beneficiaries are likely to view an increase in the number of investment alternatives as a benefit. Therefore, plan sponsors view the additional investment alternatives as a low cost enhancement to their plan, whether it is an existing plan or newly adopted. However, the value of offering additional investment alternatives may be less than perceived if the result is exposure to additional fiduciary liability for the plan sponsor or other plan fiduciaries.

Fiduciaries' exposure to liability may be increased by a violation of the disclosure requirements of ERISA section 404(c).⁷⁴ Some of the automatic disclosure items required by the regulations include a description of *each* investment alternative along with its risk and return characteristics and the type of assets comprising the portfolio.⁷⁵ Also required is a description of any transaction fees or expenses which may be incurred in connection with buying or selling interests in different investment alternatives.⁷⁶ If a large number of investment alternatives are offered by a plan, the volume of automatic disclosure items would create a significant burden on the plan sponsor. The likelihood that a plan sponsor will meet this burden decreases as the number of investment alternatives increases.

The plan sponsor may frequently rely on a contract investment provider, such as a mutual fund broker or insurance company, to handle disclosure of

72. See *id.* at 659 n.12.

73. See *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1 (1998).

74. See Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(1) & (2) (1998).

75. *Id.* § 2550.404c-1(b)(2)(i)(B)(1)(ii).

76. *Id.* § 2550.404c-1(b)(2)(i)(B)(1)(v).

investment information.⁷⁷ However, while many contract investment providers may state that their services qualify the plan for liability protection under ERISA section 404(c), the investment providers will rarely assume fiduciary duties under the plan.⁷⁸ The ultimate responsibility for providing the required disclosure materials lies with the plan sponsor or other plan fiduciaries.⁷⁹

In addition to the fund descriptions and fee information, a prospectus for each investment alternative must be provided when a participant or beneficiary makes an initial deposit into an investment alternative.⁸⁰ Timely providing the required prospectuses may lead to a situation similar to that of the other automatic disclosure items. Prospectuses are commonly distributed by the contract investment provider, but again the ultimate responsibility for providing the required prospectuses lies with the plan sponsor or other fiduciaries wishing to obtain the section 404(c) liability protection. If transactions are completed by computer or telephone, tracking the transactions to determine when a prospectus is required⁸¹ becomes a rather complex task. A fund provider is likely to be in the best position to complete this task.⁸² Plan sponsors must then be aware of the potential fiduciary liability that exists for providing disclosure so that they may properly negotiate with third parties who provide services for their plans and take appropriate measures to manage the liability.

77. See Collins, *supra* note 1.

78. See *id.*

79. See 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1). The disclosure information must be provided by an identified plan fiduciary or a person designated to act on his behalf. While the contract investment provider may be designated to act on behalf of the plan fiduciary, the provider does not attain fiduciary status by so acting. Because the plan fiduciary is attempting to obtain liability protection under the statute, the fiduciary must ensure that all requirements for compliance are met. *Id.*

80. *Id.* § 2550.404c-1(b)(2)(i)(B)(1)(viii). This requirement is also satisfied if a prospectus is given to the participant or beneficiary before the initial investment in an alternative is made. The prospectus may be given before an initial investment is made if either the plan sponsor provides a prospectus for all alternatives initially or if the participant has previously requested and received the prospectus pursuant to section 2550.404c-1(b)(2)(i)(B)(2)(ii).

81. As previously discussed, a prospectus is required whenever a participant or beneficiary makes an initial investment in any investment alternative (i.e., an alternative in which that participant or beneficiary has not previously made an investment) or whenever one is requested by a participant or beneficiary. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(viii) (1998). It could be a fairly complex task to monitor all transactions and determine which constitute an initial investment. A plan sponsor almost certainly will have to rely on a contract fund provider or contract third party administration firm for this tracking. However, because neither fund providers nor third party administration firms typically assume fiduciary roles, the plan sponsor will likely retain the risk of exposure to fiduciary liability for these activities.

82. The vast majority of plan sponsors will not be willing or able to install and maintain an automated response system, whether accessed by computer, telephone, or both, that can process and track participant transactions. A fund provider or other third party service provider can more efficiently maintain such a system that will serve multiple plans.

A contract fund provider also may offer to select the funds that will serve as the investment alternatives for the participants and beneficiaries simply by allowing investment into all of the funds handled by the provider.⁸³ As with the disclosure materials, however, the contract fund provider generally assumes no fiduciary responsibility for the selection.⁸⁴ The plan sponsor may not even realize that the selection of investment alternatives carries with it significant fiduciary liability.⁸⁵

In addition to selecting funds, the plan sponsor or other designated fiduciary has an obligation to monitor the investment alternatives to ensure that they remain prudent.⁸⁶ Each investment alternative must meet the diversification and risk and return requirements of the DOL regulations.⁸⁷ Events may occur, such as the fund being invested contrary to its stated objective and investment style, that would render the investment an imprudent alternative, giving rise to potential fiduciary liability and a concurrent loss of section 404(c) protection.⁸⁸

The plan sponsor must ensure that prudence is used to select and monitor the investment alternatives made available under the plan. The plan sponsor may accomplish this by assuming the responsibility or contracting with a professional advisor or trust company who is willing to take on the fiduciary responsibilities.⁸⁹ If the plan sponsor simply relies on a contract fund provider, who has no fiduciary responsibility, to select and monitor the available alternatives, the sponsor may have significant exposure to fiduciary liability for the contract provider's actions.⁹⁰

B. Liability Resulting from Noncompliance

Violating the requirements of ERISA section 404(c) and the DOL regulations results in a breach of fiduciary duty.⁹¹ Therefore, the parties involved with any ERISA plan must understand who the plan fiduciaries are and what duties are associated with fiduciary status. Certain plan fiduciaries, such as the plan sponsor and trustee(s), are fairly easy to determine because they are named in the plan. However, other parties may also acquire fiduciary status by their actions. ERISA section 3(21) and the underlying DOL regulations define the acts that can lead to fiduciary status.⁹²

83. See Collins, *supra* note 1.

84. See *id.*

85. See *id.*

86. See *id.*

87. See Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2250.404c-1(b)(3) (1998).

88. See Collins, *supra* note 1.

89. See *id.*

90. See *id.*

91. See *id.*

92. 29 U.S.C. § 1002(21) (1994); Definition of Terms, 29 C.F.R. §§ 2510.3-21(c)-(e) (1998).

Any person can become a fiduciary to the extent that the person (1) exercises any discretionary authority or control over the management of the plan or disposition of its assets, (2) gives investment advice or has authority to give such advice with respect to plan assets, or (3) has any discretionary authority or responsibility in the administration of the plan.⁹³ Persons who have any discretionary authority with respect to any aspect of the plan or its assets should be aware that they may have attained fiduciary status. However, exactly what constitutes investment advice seems less clear.

Recognizing the need for further guidance, the DOL issued regulations attempting to clarify what constitutes investment advice, both generally and specifically, with respect to ERISA section 404(c) plans.⁹⁴ In general, two conditions must be satisfied before a person is considered to have given investment advice.⁹⁵ First, the person must "render . . . advice to the plan as to the value of securities or other property, or make . . . recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property."⁹⁶ Virtually any advice concerning investment in specific assets would appear to fall within the scope of this condition. The second condition is satisfied if either (1) the type of advice described by the first condition above is given on a regular basis or pursuant to a mutual agreement or understanding, or (2) the person has discretionary authority to buy or sell assets for the plan.⁹⁷

The interpretive bulletin issued by the DOL in 1996 further clarifies the first condition as it applies to participant-directed plans. It attempts to distinguish which types of information given to plan participants and beneficiaries constitute investment advice, giving rise to fiduciary status, from information that constitutes only investment education, which does not confer fiduciary status.⁹⁸ In defining investment advice, the interpretive bulletin follows the definition given in the previously issued regulations and simply restates it to apply specifically to situations involving the advising of participants and beneficiaries.⁹⁹

The interpretive bulletin, however, gives some meaningful direction concerning the types of information that constitute investment education which may be provided by plan sponsors or contract fund providers to participants and beneficiaries without imposing additional liability.¹⁰⁰ Under the provisions of the

93. 29 U.S.C. § 1002(21)(A) (1994).

94. 29 C.F.R. § 2510.3-21 (1998); *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1 (1998).

95. *Id.* § 2510.3-21(c)(1).

96. *Id.* § 2510.3-21(c)(1)(i).

97. *Id.* § 2510.3-21(c)(1)(ii).

98. *Id.* § 2509.96-1(b).

99. *Id.* § 2509.96-1(c). The definition of investment advice in the interpretive bulletin mirrors that of the earlier issued 29 C.F.R. § 2510.3-21(c)(1).

100. *Id.* § 2509.96-1(d). Additional liability includes lack of ERISA section 404(c) protection for plan fiduciaries and the establishment of fiduciary status for a contract fund provider or other person who was not otherwise a plan fiduciary before such "advice" is given. *Id.* § 2509.96-1(b).

bulletin, the types of information which constitute investment education, *not* investment advice, are:

- (1) General information about the benefits of plan participation and general information about the investment alternatives available under the plan, including risk and return characteristics, historical return information, and prospectuses.¹⁰¹ The information may not pertain to a particular investment or a particular participant or beneficiary.¹⁰²
- (2) Information about general investment concepts, differences between asset classes such as equities and bonds, estimating future needs (including accounting for inflation), and assessing risk.¹⁰³
- (3) Charts or graphs based on generally accepted investment theories as long as they are available to all participants and beneficiaries and disclose all facts and assumptions on which they are based.¹⁰⁴
- (4) Interactive materials such as worksheets, questionnaires, or software that is based on generally accepted investment theories as long as all facts and assumptions utilized are either disclosed or supplied by the participant or beneficiary.¹⁰⁵

The above is meant to be a guide and is not an exhaustive list.¹⁰⁶ The determination of what constitutes investment advice and what constitutes investment education is based on the facts and circumstances of each case.¹⁰⁷

After determining fiduciary status based on the above “discretion” and “investment advice” criteria, a fiduciary should understand the duties required by ERISA to avoid liability for breach of those duties. ERISA requires that fiduciaries meet a “prudent man” standard of care.¹⁰⁸ Adhering to the “prudent man” standard, a plan fiduciary must act solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits to participants and beneficiaries while providing for payment of reasonable expenses of the plan.¹⁰⁹ Additionally, while acting solely in the interest of the participants and beneficiaries, a fiduciary must act with the care, skill, prudence, and diligence under the circumstances of a prudent man acting in a like capacity by diversifying the investments of the plan to reduce the risk of large losses.¹¹⁰

101. *Id.* § 2509.96-1(d)(1).

102. *Id.*

103. *Id.* § 2509.96-1(d)(2).

104. *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1(d)(3) (1998).

105. *Id.* § 2509.96-1(d)(4).

106. *See id.* § 2509.96-1(d).

107. *See id.* § 2509.96-1(c). While some uncertainty inevitably accompanies the “facts and circumstances” standard for satisfying any condition, the regulations seem to draw a discernable line between general information about investing and investments and information pertaining to a specific participant or the advisability of investing in a specific alternative. *See id.* § 2509.96-1(d).

108. ERISA § 401(a), 29 U.S.C. § 1104(a) (1994).

109. 29 U.S.C. § 1104(a)(1) (1994).

110. *See id.* §§ 1104(a)(1)(B) & (C).

However, the fiduciary's actions should still follow the documents and instruments of the plan.¹¹¹ A fiduciary not meeting the standards of ERISA section 401(a) may be held personally liable for losses arising from such a breach, including losses to participants' or beneficiaries' accounts in which the participants or beneficiaries exercise control over the investment of the assets in those accounts.¹¹²

The requirement that a fiduciary act "solely in the interest of the participants and beneficiaries" does not mean that all issues of interpretation must be resolved in favor of the participant or beneficiary.¹¹³ The fiduciary must also follow the documents and instruments governing the plan in discharging its duties.¹¹⁴ Otherwise, plan participants and beneficiaries would be encouraged to challenge all benefit determinations and any other fiduciary act affecting their account balances or eligibility for benefits. Such encouragement would be inefficient for the administration of retirement plans and the judicial system.

All fiduciary decisions are subject to the prudence standard, including selection and monitoring of investment alternatives.¹¹⁵ The DOL has issued guidance in how fiduciaries may comply with their fiduciary obligations in dealing with the investment of plan assets and selecting appropriate investment alternatives for participant-directed account plans.¹¹⁶ As noted earlier, the fiduciary standards extend beyond the selection of plan investments to a duty to monitor investments to insure that they continue to be prudent investments or investment alternatives for the plan.¹¹⁷

111. See *id.* § 1104(a)(1)(D). The documents and instruments of the plan need only be followed to the extent they are consistent with the other provisions of ERISA. *Id.*

112. ERISA § 409(a), 29 U.S.C. § 1109(a) (1994). This section imposes personal liability on plan fiduciaries to restore losses to a plan resulting from a breach of fiduciary duty. See also *Conner v. Mid S. Ins. Agency*, 943 F. Supp. 647, 659-60 (W.D. La. 1995) (holding that plan fiduciaries are not insulated from liability for their breaches under the liability exemption provided by ERISA section 404(c) simply because the plan participants were permitted to and in fact did exercise control over the assets in their accounts).

113. See *O'Neil v. Retirement Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 61 (2d Cir. 1994) (holding under ERISA section 404(a)(1)(D) that "a fiduciary must discharge its duties with respect to a plan in accordance with the documents and instruments governing the plan").

114. See *id.*; see also ERISA § 401(a), 29 U.S.C. § 1104(a)(1)(D) (1994). Therefore, the plan documents must be followed to the extent the documents are consistent with ERISA, but the fiduciary must discharge its discretionary functions solely in the interest of the plan participants and beneficiaries. See *O'Neil*, 37 F.3d at 61.

115. See Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404a-1 (1998).

116. *Id.* See also *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (applying the ERISA section 404(a) fiduciary standards, to which the regulations at 29 C.F.R. § 2550.404a-1 apply, to a participant-directed (ERISA section 404(c)) plan).

117. See *Collins*, *supra* note 1; see also *Unisys*, 74 F.3d at 443 (holding that Unisys owed a duty to disclose information to plan participants about the deteriorating financial condition of an

In *Unisys*, the court presented a method to determine whether the fiduciary has satisfied his or her duties in connection with selection of plan investment alternatives. The court recognized a duty by plan fiduciaries to “conduct an independent investigation into the merits of a particular investment [alternative].”¹¹⁸ In discharging this duty, the court encouraged the use of consultants and professional advisors, but warned that the advice received from a consultant or advisor should not be relied upon blindly.¹¹⁹ While the court did not recommend duplicating the efforts of professional advice, it required the fiduciary to assess the information provided by the consultant or advisor, to supplement the information where necessary, and to make the ultimate decision as to the prudence of a particular investment.¹²⁰

The court also endorsed the standard expressed by Judge Scalia (now Justice Scalia) in *Fink v. National Savings and Trust Co.*,¹²¹ that the determination of a given decision’s prudence should be evaluated on “the basis of what the [fiduciary] knew or should have known.”¹²² This “should have known” standard is consistent with the current DOL regulations which provide that a fiduciary’s duties are only satisfied after giving “appropriate consideration to those facts and circumstances that . . . the fiduciary knows or should know are relevant to the particular investment”¹²³ In light of this standard, it is unlikely that a fiduciary will discharge its duty properly with respect to selecting investment alternatives when a plan allows a very large number of investment alternatives. The ultimate responsibility is on the plan sponsor or other fiduciary to decide which funds represent prudent investments without blind reliance upon the representations or opinions of the fund provider.

In connection with the investment alternatives, the fiduciary has a duty to give complete and accurate information without materially misrepresenting the facts.¹²⁴ In addition to the standard that “when a [fiduciary] speaks, it must speak truthfully,”¹²⁵ the court in *Unisys* recognized “not only a negative duty not to misinform, but also an affirmative duty to inform when the [fiduciary] knows that silence might be harmful.”¹²⁶ The court applied this standard in *Unisys* when an

insurance company providing a guaranteed investment contract alternative to the plan).

118. *Unisys*, 74 F.3d at 435.

119. *Id.* at 435-36.

120. *Id.*

121. 772 F.2d 951 (D.C. 1985).

122. *Unisys*, 74 F.3d at 436 (citing *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part)).

123. Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404a-1(b)(1)(i) (1998).

124. See, e.g., *Unisys*, 74 F.3d at 441; *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992).

125. *Unisys*, 74 F.3d at 442 (quoting *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993)).

126. *Id.* at 441 (quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)).

insurance company providing an investment alternative under the plan encountered severe financial distress.¹²⁷ While unable to rule on whether the fiduciaries involved breached their duty, because material questions of fact remained, the court indicated that the fiduciaries had a duty to inform the participants of the financial condition of the insurance company.¹²⁸

Plan fiduciaries have many duties to fulfill with respect to a plan and its participants. However, they do not bear unlimited liability for losses incurred by the plan. Under the statutory language of ERISA section 409(a), plan fiduciaries are liable only for losses resulting from their breaches.¹²⁹ Additionally, the actions that may constitute a breach, which exposes a fiduciary to liability, are limited to those actions or events occurring while the person or entity is a plan fiduciary.¹³⁰ Relevant case law supports the requirement of a causal relationship between the act constituting the breach and the loss to the plan.¹³¹

In *Reich v. McManus*,¹³² the defendant brokers were alleged to have acquired fiduciary status by their exercise of discretionary control over the investment of certain plan assets and by giving investment advice. The court held that a person acquiring fiduciary status by either of these actions is liable for losses only to the extent that they performed these respective functions.¹³³ Therefore, all plan fiduciaries are not exposed to liability simply because there is a loss to the plan; a plaintiff must show a relationship between the fiduciary's action and the claimed loss.

A similar issue was presented by *Payonk v. HMW Industries, Inc.*¹³⁴ The defendant involved in *Payonk*, however, was the employer, who also served as a plan fiduciary. In *Payonk*, the employer/fiduciary decided to terminate the plan which adversely affected certain participants who had "opted out" of the plan shortly before the termination.¹³⁵ The employer did not inform the participants or beneficiaries of the decision to terminate the plan until notices required by statute had to be given.¹³⁶ The plaintiffs claimed that the employer, as a plan fiduciary, breached its duty to inform by withholding information about the plan termination. The court, however, agreed with the defendant employer's contention that the decision to terminate the plan was a business decision and was not subject to ERISA's fiduciary requirements.¹³⁷ "[W]hen an employer

127. *Id.*

128. *Id.* at 443.

129. 29 U.S.C. § 1109(a) (1994).

130. *Id.* § 1109(b). Plan fiduciaries are not liable as fiduciaries for actions which occur before one became a fiduciary or after one ceases to be a fiduciary. *Id.*

131. See, e.g., *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989); *Reich v. McManus*, 883 F. Supp. 1144, 1148 (N.D. Ill. 1995).

132. 883 F. Supp. 1144 (N.D. Ill. 1995).

133. *Id.* at 1148.

134. 883 F.2d 221, 224-25 (3d Cir. 1989).

135. *Id.* at 223-24.

136. *Id.* at 224.

137. *Id.* at 229.

wears 'two hats' as employers and as [fiduciaries] . . . they assume fiduciary status 'only when and to the extent' that they function in their capacity as [fiduciaries], not when they conduct business that is not regulated by ERISA."¹³⁸ This case extends the notion that fiduciaries are liable only for losses that result from their actions to exclude situations in which a plan fiduciary is not acting within his or her fiduciary capacity.

III. DANGERS OTHER THAN POTENTIAL FIDUCIARY LIABILITY: FREQUENT ACCOUNT ACCESS BY PARTICIPANTS AND BENEFICIARIES

Many plans that allow participants and beneficiaries to control the investment of the assets in their accounts permit automated transactions via telephone or computer.¹³⁹ These systems allow participants and beneficiaries to reallocate existing assets and to change elections for the investment of future contributions.¹⁴⁰ This control suggests that a given participant or beneficiary may have a significant impact on the investment performance he or she will experience while participating in the plan. Since the majority of plan participants and beneficiaries lack formal training in making investment decisions, poor investment performance is a likely result.¹⁴¹ Furthermore, the ease with which a participant or beneficiary may access his or her account to make changes may lead to an increase in account activity. Since poor investment performance is the expected result of decisions made by untrained investors, an increase in changes to investment choices will most likely compound the problem and further depress account performance.¹⁴² Poor investment performance over one's entire period of plan participation may have a significant effect on the level of assets available at retirement.¹⁴³

The current regulations do not protect participants and beneficiaries from poor investment performance in participant-directed account plans. The regulations explicitly state that plan fiduciaries have no obligation to give

138. *Id.* at 225 (quoting *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985)).

139. I.R.S. Notice 99-1, 1999-2 I.R.B. 8.

140. The regulations do permit reasonable restrictions on how often investment instructions may be given with respect to a specific investment alternative. Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C) (1998). However, the ease by which automated transactions may be processed will likely lead plan sponsors to provide more liberal access.

141. *See Hoecker & Campbell, supra* note 36, at 213.

142. *See id.*

143. For example, assume a participant has monthly account additions of 6% of salary, earns a level salary of \$40,000 per year, and works for 30 years. The participant will accumulate about \$456,000 by retirement if the account earns an average of 10% per year. However, if under the same set of assumptions the account achieves only 5% earnings per year, the participant will accumulate only about \$167,000.

investment advice.¹⁴⁴ In fact, as discussed earlier, rendering investment advice is discouraged by ERISA because it could lead to additional fiduciary liability.¹⁴⁵ The DOL issued Interpretive Bulletin 96-1, distinguishing investment advice from investment education, to give guidance on the types of investment-related information plan fiduciaries *may* provide participants and beneficiaries without losing their ERISA section 404(c) liability protection.¹⁴⁶ However, the regulations contained in the bulletin still do not *require* plan fiduciaries to provide any type of investment education to participants and beneficiaries who must make the investment decisions.¹⁴⁷

The only information that must be given to plan participants and beneficiaries to assist them in making their investment decisions is that specified by the required disclosure provisions in the regulations.¹⁴⁸ While items required by the disclosure provisions, such as risk and return characteristics, historical performance, and prospectuses, are important to making investment decisions, they may be inadequate for someone who has not been given some information about general investment principles or the differences between asset classifications.

If plan participants and beneficiaries make their own investment decisions with respect to their retirement savings and poor asset performance is the result, many different problems could arise. Poor investment performance could force some participants to postpone their retirement to accumulate additional funds.¹⁴⁹ Not all individuals will have the option of postponing their retirement. Health problems may force retirees with insufficient retirement benefits to rely on their families or the state for financial assistance.

IV. POSSIBLE REMEDIES

The problems of compliance and possible fiduciary exposure by plan fiduciaries and the increased burden on plan participants to assume investment risks could be remedied by a couple of different methods. The first potential remedy calls for the DOL and the courts to require strict compliance with the provisions in the existing regulations. A second possibility is to revise or interpret the existing regulations in such a way as to make compliance by plan sponsors and other plan fiduciaries easier to achieve, relieving some of the risk

144. Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404c-1(c)(4) (1998).

145. See *supra* notes 94-107 and accompanying text.

146. *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1 (1998). See *supra* notes 98-107 and accompanying text.

147. 29 C.F.R. § 2509.96-1 (1998).

148. See *id.* § 2550.404c-1(b)(2)(i)(B).

149. Increased life expectancies and inflation require a larger accumulation for retirement than in the past. If participants and beneficiaries are to bear the investment risk of their retirement assets and wish to retire before reaching their seventies, good investment performance is necessary.

of fiduciary liability for noncompliance. Changes to the current statutory language or regulations should be made with the goals of ERISA in mind: To protect the interests of plan participants and beneficiaries in private pension plans and to promote a healthy private pension system.¹⁵⁰

A. Strict Compliance Requirement

The existing statutory language and regulations could be interpreted strictly by the DOL and the courts to promote ERISA's primary purpose. One fiduciary role likely to be impacted by this approach would be the selecting and monitoring of investment alternatives from which participants and beneficiaries may choose. A strict application of the regulations would force plan fiduciaries to offer only prudent, well-diversified investment alternatives and would require fiduciaries to monitor all investment alternatives to ensure that they remain prudent.¹⁵¹ Holding fiduciaries to a high standard and imposing fiduciary liability to ensure compliance will allow plan participants to choose from sound investment choices and help minimize the risk of losses and poor investment performance due to their investment decisions.

If plan fiduciaries knew they would be held to strict compliance standards or face significant liability, the current disclosure procedures would likely change. In order to meet the disclosure requirements pertaining to investment alternative descriptions, fees, limitations on instructions, and restrictions on transfer which apply to all investment alternatives,¹⁵² plan fiduciaries may be more inclined to limit the number of investment alternatives, thus limiting the required disclosure to a level which may be managed and monitored.¹⁵³ Fewer funds would make participant investment choices easier and the disclosure requirements more practical. If the number of funds is limited, a participant or beneficiary may be more likely to utilize the disclosure materials provided to make an informed choice.¹⁵⁴ A participant is not likely to review disclosure materials for tens or hundreds of different investment alternatives. This makes such disclosure moot and renders the requirement ineffective in promoting one of ERISA's main

150. See, e.g., ERISA §§ 2(b) & (c), 29 U.S.C. §§ 1001(b) & (c) (1994) (stating the policy of ERISA as "to protect . . . the interests of participants in employee benefit plans and their beneficiaries" and to "improv[e] the equitable character and soundness of such plans"). See also H.R. REP. NO. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639-43 (stating the primary purpose of ERISA is the "protection of individual pension rights").

151. 29 C.F.R. §§ 2550.404a-1(b), 2550.404c-1(b)(3) (1998).

152. *Id.* §§ 2550.404c-1(b)(2)(i)(B)(1)(ii), (iv) & (v).

153. See *id.* § 2550.404c-1(b)(2)(i)(B)(1)(viii). Limiting the number of funds offered would also make the requirement that a prospectus be provided after each initial investment in an alternative fund easier to monitor. See *id.*

154. A participant may be able to better understand what is available by reviewing the disclosure materials for all of the alternatives. While this will not necessarily increase understanding of investment skills, investment risks may be minimized by offering prudent alternatives.

purposes, to protect the interests of plan participants and beneficiaries.¹⁵⁵

Along with holding plan fiduciaries to strict compliance with the existing regulations, the regulations should be amended to encourage plan sponsors and other fiduciaries to provide ample investment education and assistance to plan participants and beneficiaries. The DOL Interpretive Bulletin 96-1 has taken a step in this direction by clarifying the types of information that a fiduciary could give to a participant without losing the liability protection of ERISA section 404(c).¹⁵⁶ The DOL could further encourage such education of participants and beneficiaries by offering additional safe harbors to preserve section 404(c) protection or by providing model educational materials that discuss investment theories or charts, graphs, worksheets, or even interactive computer programs similar to those allowed in the interpretive bulletin.¹⁵⁷

Of course the ultimate encouragement could be provided in the form of mandated investment education of participants and beneficiaries by plan fiduciaries (most likely the plan sponsor). Such a mandate would ensure that all participants and beneficiaries receive a certain minimum amount of information about investment strategies and the different types of funds offered. This mandated program could be active, by requiring distribution of materials or providing a presentation, or passive, by requiring the fiduciary to designate an investment advisor who would be available to provide materials or answer questions.

Under this potential remedy of requiring strict compliance of existing regulations and implementing some changes to promote investment education,¹⁵⁸ the primary goals of ERISA are reasonably served.¹⁵⁹ The effect of strict compliance and education would be to lower the investment risk assumed by participants and beneficiaries, which would protect their interests as well as lead to a healthier private pension system.

B. Relaxed Disclosure Remedy

A second approach to improving the participant-directed account plan arena is to relax the current disclosure requirements to promote flexibility to participants and accommodate the use of current technology.¹⁶⁰ Under this

155. See *supra* note 150 and accompanying text.

156. *Interpretive Bulletins*, 29 C.F.R. § 2509.96-1(d) (1998).

157. See *id.* § 2509.96-1(d)(2), (3) & (4).

158. Requiring a mandatory educational program could result in discouraging plan sponsors from implementing or maintaining retirement plans due to the increased burden and cost of providing the education. This could work contrary to ERISA's purpose of promoting a healthy private pension system. See *supra* note 150 and accompanying text. The best overall alternative would be for the DOL to implement programs to encourage plan sponsors to provide education voluntarily.

159. See *supra* note 150 and accompanying text.

160. It may be more feasible to provide some disclosure items such as investment descriptions or transaction confirmation electronically, however, many disclosure items are required to be given

scenario, a plan could safely offer as many investment alternatives as it found to be feasible.¹⁶¹

To implement this remedy, the current disclosure requirements could be modified so that plan fiduciaries would remain in compliance and their section 404(c) fiduciary protection from losses due to the investment decisions made by plan participants and beneficiaries would be preserved. One way the disclosure requirements could be modified is to limit automatic disclosure to "core" investment alternatives. For example, the plan fiduciary would provide only a description of the core investments along with their risk and return characteristics rather than provide this information for all investment alternatives.¹⁶² If participants wanted the information on other available alternatives, the plan fiduciary would have a duty to provide it only upon request of the participant. The regulations could permit plans to make this type of information available through a participant-accessible database. In order to provide adequate investment alternatives to those who do not inquire about the other available alternatives, the core investment alternatives would have to meet all of the diversity and prudence requirements currently in the regulations.

The prospectus requirement could also be relaxed to require that prospectuses be provided only upon request of the participant.¹⁶³ With respect to the core investment alternatives, the prospectus requirement could be left unchanged¹⁶⁴ or revised to provide that prospectuses for all core alternatives be distributed to a participant upon entering the plan or to a beneficiary who becomes eligible to receive benefits from the plan.

Many of the disclosure requirements would not need to be changed to maintain compliance when a large number of investment alternatives are offered. For example, the fiduciary still would have to provide a statement that the plan is intended to qualify as a section 404(c) plan and the investment managers and plan fiduciaries still would have to be identified automatically to all participants and beneficiaries.¹⁶⁵

Congress may have already taken a step toward relaxing some of the existing requirements governing section 404(c) plans. The Taxpayer Relief Act of 1997 calls for regulations interpreting several existing requirements under ERISA and the Internal Revenue Code, including disclosure, notice, and election

in writing. It is not clear if providing such information electronically satisfies such a requirement. *See, e.g.,* Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. § 2550.404c-1(b)(2)(i)(A) (1998).

161. With automated transactions and data transfer this could be an almost unlimited number. *See* Hoecker & Campbell, *supra* note 36, at 213.

162. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii) (1998).

163. *See id.* § 2550.404c-1(b)(2)(i)(B)(1)(viii). This section currently requires a prospectus be provided whenever a participant or beneficiary makes an initial investment into an alternative. *Id.*

164. *See id.*

165. *See id.* §§ 2550.404c-1(b)(2)(i)(B)(1)(i), (iii) & (vi).

requirements, as they apply to the use of new technologies.¹⁶⁶ The Act also calls for regulations clarifying when the writing requirements of the Internal Revenue Code will be satisfied by paperless transactions.¹⁶⁷ However, the Act fails to mention expanding the writing requirements of ERISA to include paperless transactions. It is not clear why paperless transactions would not be allowed under ERISA as well as the Internal Revenue Code. The answer may lie with the final regulations that are called for in the Act.¹⁶⁸

An area of concern under this relaxed disclosure remedy is, again, the investment education of participants and beneficiaries. Increasing alternatives and relaxing disclosure makes the participants' decisions more difficult and their investment risk greater. A system of education should be included in the statutory or regulatory changes implementing this type of scenario if ERISA's purposes are to be served. A fiduciary obligation to provide investment education would help reduce the increased burden to the participants and beneficiaries of fund selection and investment risk.

CONCLUSION

Due to advances in technology and in the attempt to meet the expectations of plan participants and beneficiaries, participant-directed plans offer an increasing number of investment alternatives and account access. This increased flexibility may be viewed as a benefit by participants, beneficiaries, and plan sponsors, but it could lead to problems for both sides.

Plan sponsors and other plan fiduciaries are less likely to meet the requirements of ERISA section 404(c) and the accompanying DOL regulations when offering a large number of investment choices. Noncompliance could result in significant fiduciary liability exposure by removing the protection offered by section 404(c).

Plan participants and beneficiaries will experience more investment risk and will face the likelihood of poor investment performance. This could result in account balances that are inadequate to allow participants to retire at the time or at the standard of living that they had expected.

Strictly enforcing the existing regulations would encourage compliance and protect the investments of participants and beneficiaries, as well as promote the purposes of ERISA. However, this is not a practical solution because it discourages the use of technology to streamline the administration of these types of plans.

A better solution would be to revise the existing regulations to allow plan sponsors to offer the types of plans being demanded by the marketplace while remaining in compliance and minimizing their fiduciary liability exposure. A necessary addition to the regulations under this scenario is to require some level

166. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1510(a), 111 Stat. 788, 1068-69 (1997).

167. *Id.* at 1069.

168. *See supra* note 7.

of investment education for plan participants and beneficiaries sufficient to allow them to make intelligent choices while facing a myriad of investment options. The educational provision is necessary to protect the interests of participants and beneficiaries within the stated purposes of ERISA.

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